

(16,253.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 155.

THE UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

ELIZABETH KIRCHOFF.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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I To the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States:

Your petitioner, The Union Mutual Life Insurance Company, a corporation duly organized and doing business under the laws of the State of Maine, respectfully represents that on the 31st day of March, A. D. 1894, the supreme court of the State of Illinois entered a decree and judgment in a cause wherein The Union Mutual Life Insurance Company, your petitioner, was appellant and Elizabeth Kirchhoff, of the county of Cook and State of Illinois, was appellee; that the said supreme court of the State of Illinois is the highest court of the State of Illinois in which a decision in said suit can be had, and that the said decree and judgment so rendered was against your petitioner and was a final decree and judgment in said cause.

Your petitioner further represents that by the record of said cause in the said State courts of Illinois it is shown that the said Elizabeth Kirchhoff, together with her husband, Julius Kirchhoff, and her mother, Angela Diversey, on May 8, 1871, borrowed of the Union Mutual Life Insurance Company, your petitioner, the sum of sixty thousand dollars (\$60,000), and to secure the payment thereof executed their joint judgment note and a trust deed covering certain real estate in Cook county, Illinois, belonging to said Elizabeth Kirchhoff, her said husband, and mother, and including, among other lots and parcels of land, lots two (2) and four (4), in block twenty-one (21), of the Canal Trustees' subdivision of the south fractional quarter ($\frac{1}{4}$) of section three (3), township thirty-nine (39) north, range fourteen (14) east, of the third principal meridian; that afterwards, on the 11th day of

II July, A. D. 1878, default having been made in the payment of said loan, your petitioner filed a bill in the circuit court of the United States for the northern district of Illinois for the purpose of foreclosing the said trust deed given as aforesaid, as to all the real estate therein described (Record, 185); that service was duly made on said Elizabeth Kirchhoff, Julius Kirchhoff, and Angela Diversey on the 10th day of August, 1878 (Record, 185); that on the 20th day of November, 1878, the said defendant, Angela Diversey, filed her answer in said cause; that on the 11th day of November, 1878, the said Elizabeth and Julius Kirchhoff failing to appear in said cause, an order of default was entered against them and the said bill as to them was taken as confessed (Record, 185); that the said cause was afterwards referred to a master in chancery of said court to take proofs, and that on the 2nd day of July, 1880, the said master filed his report in said cause, in which he found that the allegations in said bill were true, and recommended a foreclosure of said trust deed (Record, 186); that on August 30, 1880, there was entered in said cause a decree confirming said master's report and ordering said master to make a sale of the entire premises covered by said trust deed, including said lots two (2) and four (4) aforesaid (Record, 186); that on the 29th day of October, 1880, the said master filed in said cause his report; that in pursuance of said decree he did on the 20th day of October, 1880, make a sale of said prem-

ises, as described in said decree, and that your petitioner, being the highest bidder at said sale, became the purchaser of said property in separate parcels, including the said lots two (2) and four (4) hereinabove described (Record, 186); that on the 24th day

III of February, 1881, there was entered in said cause an order confirming said master's sale, and that on the 21st day of January, A. D. 1882, the time for redemption under the statutes of Illinois having expired, deeds were made by the said master in chancery to your petitioner for the said lots, and that on the same day an order was entered in said cause in said circuit court of the United States approving said master's deeds (Record, 186), whereby your petitioner acquired a title and right through, under, and by virtue of the authority of the circuit court of the United States.

Your petitioner further represents that on the 12th day of June, A. D. 1882, the said Elizabeth Kirchoff, appellee in the said cause in the supreme court of the State of Illinois, filed in the circuit court of Cook county, being one of the courts of said State of Illinois, her bill in chancery, wherein she in substance claimed both that she had a verbal contract, alleged to have been made long prior to the proceedings in the circuit court of the United States hereinabove referred to, for the reconveyance of said lots, and that the said deeds for said premises issued to your petitioner under and by virtue of the authority of the United States circuit court aforesaid and in the manner aforesaid were invalid and ineffectual as conferring title upon your petitioner or foreclosing her title therein for the pretended reason that long prior thereto she, as mortgagor, entered into a verbal agreement with your petitioner, as mortgagee, by the terms of which the said foreclosure proceedings then pending were to be continued for the purpose of cutting off certain intervening liens and incumbrances against said property subsequent

IV to the mortgage of your petitioner, and were to be regarded as having no force and effect in cutting off her right of redemption in said lots or in conferring title upon your petitioner, and that said right of redemption, notwithstanding said judicial proceedings for foreclosure, was to continue in the said Elizabeth Kirchoff and extend through a period of ten years instead of twelve months, and that the amount of redemption was to be ten thousand dollars (\$10,000) instead of seventeen thousand dollars (\$17,000), the amount paid at said sale; that the said Elizabeth Kirchoff prayed in her said bill for a decree of specific performance or a decree allowing her to redeem said two lots upon the payment of the said ten thousand dollars (\$10,000) in the manner designated in said pretended agreement, one thousand dollars (\$1,000) each year for ten years, notwithstanding the said judicial sale and the deeds issued thereunder by authority of the United States circuit court aforesaid and notwithstanding the fact that the time for redemption had expired, and that the amount of redemption was upwards of seventeen thousand dollars (\$17,000), all of which is shown by her amended bill and proposed amended bill. (Record, 5-9, 15-19, 19-23.)

Your petitioner further represents that on the 28th day of Octo-

ber, A. D. 1881, and prior to the issuance of said deeds to your petitioner by the said master in chancery of the United States circuit court and the entry of the order in said court approving the same, one James R. Page, a receiver previously appointed in said foreclosure suit, filed a petition in said circuit court of the United States

for the northern district of illinois in said foreclosure suit, V asking for the possession of said premises from said Julius Kirchhoff, husband of the said Elizabeth Kirchhoff and a defendant in said foreclosure suit; that thereupon said Elizabeth Kirchhoff, through her husband, Julius Kirchhoff, as is admitted in her said bill (Record, pp. 21, 22), resisted said application for a writ of assistance, setting forth in substance the above-mentioned pretended agreement between your petitioner and said Elizabeth Kirchhoff, and that upon the hearing of said application and answer, to wit, on the 16th day of November, A. D. 1881, the said court issued its writ of assistance to the marshal of said district, thereby overruling said answer and directing the said marshal to put the receiver in said foreclosure suit in possession of said premises, the solicitors for your petitioner supporting the said application of the receiver and disregarding the pretended agreement with the said Elizabeth Kirchhoff, as is set forth in said bill and as shown by the evidence produced in the said circuit court of Cook county by your petitioner, consisting of the files and record in the said foreclosure suit in the United States circuit court, as aforesaid. (Rec., 21, 22, 186, 338, 339, and 542.)

Your petitioner further represents that to the said bill filed by the said Elizabeth Kirchhoff in the circuit court of Cook county, as aforesaid, a demurrer was interposed by your petitioner (Rec., 10), which demurrer was overruled (Rec., 11), and that afterwards your petitioner filed an answer to said bill, reserving in said answer the same advantage as if it had pleaded or demurred to said bill, in which answer your petitioner denied the making of any agreement for redemption, as set forth in the said bill, and also set up

VI the statute of frauds as a further defense, and that upon the hearing of the case upon pleadings and proofs the said bill was dismissed for want of equity; that an appeal was taken to the supreme court of the State of Illinois, which appeal was dismissed on the ground that the same should have been taken to the appellate court; that thereupon the said Elizabeth Kirchhoff, complainant in the said bill, sued out a writ of error from the appellate court of the first district of Illinois to the circuit court of Cook county, and that upon a hearing in the appellate court the said decree of the circuit court of Cook county dismissing the said bill was reversed, with directions to the said circuit court to enter a decree in accordance with the opinion of the said appellate court (Rec., 295, 311-315, 461-466); that from the said decree of said appellate court your petitioner prosecuted an appeal to the supreme court of Illinois, which said court upon said appeal affirmed the decree of the said appellate court. (Rec., 299-306.)

Your petitioner further represents that afterwards, on the 9th day of December, A. D. 1890, a copy of said order of said appellate

court with *procedendo* was filed in the said circuit court of Cook county, and that the said cause, on motion of the solicitor for the said Elizabeth Kirchoff, was redocketed in the said circuit court of Cook county (Rec., 352-355); that there were also filed in the said circuit court of Cook county copies of the aforesaid opinions of the appellate and supreme courts of the State of Illinois, duly certified by the respective clerks of said courts (Rec., 462, 468); that on the 26th day of January, A. D. 1893, the said circuit court of Cook county entered a decree which in terms was stated to be in

VII accordance with the aforesaid opinions of the appellate and supreme courts of Illinois (Rec., 483), and which said decree allowed the said Elizabeth Kirchoff to redeem said lots of land, notwithstanding the title and right of your petitioner in and to the said property obtained and held by it under the authority of the said circuit court of the United States for the northern district of Illinois.

Your petitioner further shows that an appeal was taken from the decree last above mentioned to the appellate court for the first district of Illinois, and upon said appeal the aforesaid decree of the circuit court of Cook county was in all things affirmed, as appears by the order of the said appellate court made on the 4th day of August, A. D. 1893 (Rec., 610, 617); that from this decree of the said appellate court affirming the said decree of the said circuit court of Cook county your petitioner appealed to the supreme court of said State of Illinois, on which appeal the said decree of the circuit court of Cook county and the said decree of the appellate court of Illinois for the first district affirming the same were duly affirmed in all things by the said supreme court of the State of Illinois by its order and opinion filed in the clerk's office of said supreme court on the 31st day of March, A. D. 1894 (Rec., 619-625), which judgment and decree of the said supreme court of the State of Illinois your petitioner says were against a title claimed by your petitioner under an authority exercised under the United States.

Your petitioner further represents that in the said circuit court of Cook county and in the appeals aforesaid in the appellate court and the supreme court of the State of Illinois your petitioner resisted the prayer of the said bill upon the following grounds:

First. That the said State courts had no jurisdiction to thus set aside, modify, impair, and disregard the title acquired by your petitioner under judicial authority of a court of the United States.

Second. That the decree as prayed for in the said bill would not give full faith, credit, and effect to the decree, proceedings, and acts of the United States court under which your petitioner acquired title to said premises.

Third. That no such agreement as alleged in the bill aforesaid had been made.

Fourth. That the pretended agreement, so far as it might be made the ground for specific performance or the establishment of a trust, was obnoxious to the statute of frauds.

Fifth. That the agreement set up in the bill was *res adjudicata*, in

that it had been expressly passed upon on the hearing of the application for the writ of assistance and the resistance thereto by the said Elizabeth Kirchoff through her said husband, Julius Kirchoff.

Sixth. That the suit was barred by the foreclosure decree and proceedings had in the United States circuit court.

Your petitioner further represents that the said appellate court and supreme court expressly declined to consider the statute of frauds in said cause for the reason, as stated in said opinions, that the said courts regarded the bill as one to redeem from the said foreclosure sale and not one to enforce specifically a contract or trust.

IX Your petitioner further represents that the said judgment and decree of the said supreme court of Illinois terminated the litigation in the said cause so far as the courts of Illinois are concerned, and that nothing remained to be done in the circuit court of Cook county in said cause except to execute the judgment and decree which it had already rendered in said cause, as aforesaid.

Wherefore your petitioner represents that by the said decrees and doings of the said supreme court of Illinois there was drawn in question the validity of an authority exercised under the United States, and that the decision thereof has been against the validity of that authority, and that the said decrees of the said supreme court of the State of Illinois aforesaid were against the title, right, and privilege of your petitioner claimed under an authority exercised under the United States, and that by said proceedings in the said State courts there was drawn in question the validity of an authority exercised under the State of Illinois on the ground of its being repugnant to the Constitution and laws of the United States and the decision was in favor of the validity of such authority, and that the said supreme court of Illinois by its said judgments and decrees failed to give full faith, credit, and effect to the judicial proceedings of a court of the United States, in that it overruled and disregarded the express acts of the said court of the United States aforesaid foreclosing an equity of redemption, and overruled and disregarded the express adjudication of the said United States court upon the claim made by the said Elizabeth Kirchoff, and that in the said decree and judgment and proceedings of the State supreme court of Illinois there is error to the damage of your petitioner.

X Wherefore your petitioner prays for the allowance of a writ of error and such other process as will enable your petitioner to obtain a review of the case and the correction of the errors alleged by the Supreme Court of the United States.

Respectfully submitted.

UNION MUTUAL LIFE INSURANCE
COMPANY,

By FRANK L. WEAN,

Sol'r for Petitioner.

J. H. DRUMMOND,

E. PARMALEE PRENTICE,

Of Counsel.

Writ allowed.

H. B. BROWN.

In Kirchoff case bond fixed at \$1,000. No supersedeas asked for.
H. B. BROWN.

XI In the Supreme Court of the United States.

UNION MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error, }
vs.
ELIZABETH KIRCHOFF, Defendant in Error. }

Assignment of Errors.

1. The supreme court of the State of Illinois erred in that its findings and judgment are contrary to the law.

2. The supreme court of the State of Illinois erred in that its findings and judgment are contrary to the evidence.

3. The supreme court of the State of Illinois erred in affirming the judgment of the appellate court and the decree of the circuit court of Cook county, Illinois.

4. The supreme court of the State of Illinois erred in holding that the defendant in error was entitled to redeem.

5. The supreme court of the State of Illinois erred in holding that the circuit court of the said State of Illinois had jurisdiction to set aside, modify, and impair the title acquired by plaintiff in error under the judicial authority of a court of the United States.

6. The supreme court of the State of Illinois erred in holding that the State courts had jurisdiction to enter a decree for redemption from the trust deed after the said trust deed had been foreclosed by the decree, orders, and authority of the United States court.

XII 7. The supreme court of the State of Illinois erred in holding that the defendant in error was entitled to a decree for redemption in the State courts from the judicial sale made under the decrees and authority of the United States court.

8. The supreme court of the State of Illinois erred in that no agreement, such as it found, for redemption was in fact made.

9. The supreme court of the State of Illinois erred in holding that such an agreement had the effect of undoing the decree, sale, and acts of the United States court to the extent of permitting a redemption the same as if such decree, sale, and acts were not in existence.

10. The supreme court of the State of Illinois erred in deciding against the title, right, and privilege claimed by the plaintiff in error under authorities exercised under the United States.

11. The supreme court of the State of Illinois erred in holding that the order and judgment of the circuit court of the United States, on the application of the plaintiff in error for a writ of assistance, was not an adjudication of the questions involved in this suit.

12. The supreme court of the State of Illinois erred in holding

that the present action was not barred by the foreclosure proceedings in the United States circuit court.

13. The supreme court of the State of Illinois erred in that its judgment or decree does not give full faith, credit, and effect to the decree, proceedings, and acts of the United States circuit court under which plaintiff in error acquired title to said premises.

XIII 14. The supreme court of the State of Illinois erred in entering a decree which is a direct and positive interference with the rightful authority of the United States court for the northern district of Illinois.

Wherefore plaintiff in error prays that the said decree and judgment may be reversed, etc.

UNION MUTUAL LIFE INSURANCE
COMPANY.

FRANK L. WEAN,

Solicitor for Plaintiff in Error.

J. H. DRUMMOND,

E. PARMALEE PRENTICE,

Of Counsel.

XIV UNITED STATES OF AMERICA, ss :

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Illinois, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Union Mutual Life Insurance Company, appellant, and Elizabeth Kirchoff, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Con-

XV stitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Union Mutual Life Insurance Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Su-

preme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventeenth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by—

H. B. BROWN,

Associate Justice of the Supreme Court U. S.

XVI In the Supreme Court of Illinois, Northern Grand Division.

UNION MUTUAL LIFE INSURANCE COMPANY	} Appeal from Appellate Court of Illinois, First District.
vs.	
ELIZABETH KIRCHOFF.	

I, Alfred H. Taylor, clerk of the supreme court of Illinois in and for the northern grand division, do hereby certify that on the twenty-seventh day of March, in the year of our Lord one thousand eight hundred and ninety-six, a copy of the foregoing writ of error for the defendant in error was lodged in my office at Ottawa.

Witness my hand and the seal of said court this 27th day of March, A. D. 1896.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

A. H. TAYLOR,

Clerk Supreme Court.

XVII UNITED STATES OF AMERICA, ss :

To Elizabeth Kirchoff, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein The Union Mutual Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this seventeenth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

HENRY B. BROWN,

Associate Justice of the Supreme Court of the United States.

XVIII UNITED STATES OF AMERICA, }
Northern District of Illinois, } 88:

On this 26th day of March, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared before me the subscriber, Hugh Curran, and makes oath that he delivered a true copy of the within citation to William S. Harbert, and also a true copy of said citation to George R. Daley, as solicitors and counsel of Elizabeth Kirchoff in the said cause, on the 26th day of March, 1896.

HUGH CURRAN.

Sworn to and subscribed the 26th day of March, A. D. 1896.

[Seal of Mark A. Foote, U. S. Commissioner, Chicago, N. D. Ill.]

MARK A. FOOTE,
U. S. Commissioner for the Northern District of Illinois.

XIX In the Supreme Court of Illinois, Northern Grand Division.

UNION MUTUAL LIFE INSURANCE COMPANY } Appeal from Appel-
vs. } late Court of Illinois,
 ELIZABETH KIRCHOFF. } First District.

I, Alfred H. Taylor, clerk of the supreme court of Illinois in and for the northern grand division, do hereby certify that on the twenty-seventh day of March, in the year of our Lord one thousand eight hundred and ninety-six, a copy of the foregoing citation and return was lodged in my office at Ottawa.

Witness my hand and the seal of said court this 27th day of March, A. D. 1896.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

A. H. TAYLOR,
Clerk Supreme Court.

XX In the Supreme Court of Illinois, Northern Grand Division.

UNION MUTUAL LIFE INSURANCE COMPANY } Appeal from Appel-
vs. } late Court of Illinois,
 ELIZABETH KIRCHOFF. } First District.

I, Alfred H. Taylor, clerk of the supreme court of Illinois in and for the northern grand division of said State and keeper of the records and files thereof, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify the following pages, numbered from three (3) to three hundred and fifteen (315), inclusive, to be a true and complete transcript and copy of the record and proceedings had in a certain cause entitled in this court Union Mutual Life Insurance Company *vs.* Elizabeth Kirchoff, including a copy of the opinion of the appellate court of Illinois, first district, filed in said cause in compliance with rule twenty-nine of said supreme court, and a copy of the opinion of the supreme

court filed in said cause on the twelfth day of June, A. D. 1890; that pages numbered three hundred and sixteen (316) to six hundred and twenty-seven (627), inclusive, contain a true and complete transcript and copy of the record and proceedings had in said supreme court in a certain cause entitled in said supreme court Union Mutual Life Insurance Company *vs.* Elizabeth Kirchoff, including a copy of the opinion of the appellate court filed in said cause in compliance with rule twenty-nine of said supreme court, and a copy of the opinion of the said supreme court, which said opinion last aforesaid was filed in this office on the 31st day of March, A. D. 1894.

I further certify that rule 29 of the supreme court, above referred to, is in words and figures following:

Rule 29. * * * In all cases brought to this court by appeal from or writ of error to either of the appellate courts the party bringing the case to this court shall cause to be printed, either as an appendix to his brief or otherwise, the opinion filed in the appellate court, if any such shall be filed, and shall file in this court, with his brief, ten copies of such opinion.

Witness my hand and the seal of said supreme court, at Ottawa, in said State, this 27th day of March, A. D. 1896.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

A. H. TAYLOR,
Clerk Supreme Court.

3 State of Illinois Supreme Court, Northern Grand Division.

At a supreme court begun and held at Ottawa, on Tuesday, the fourth day of March, in the year of our Lord one thousand eight hundred and ninety, within and for the northern grand division of the State of Illinois.

Present: Simeon P. Shope, chief justice; John Scholfield, justice; Alfred M. Craig, justice; Benj. D. Magruder, justice; Joseph M. Bailey, justice; David J. Baker, justice; Jacob W. Wilkin, justice; George Hunt, attorney general; Lawrence Morrissey, sheriff; Alfred H. Taylor, clerk.

4 Be it remembered that afterwards, to wit, on the fifth day of March, A. D. 1890, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the circuit court of Cook county and of the appellate court of Illinois, first district, in a certain cause wherein The Union Mutual Life Insurance Company was appellant and Elizabeth Kirchoff was appellee; which said transcript is in the words and figures following, viz:

UNITED STATES OF AMERICA :

STATE OF ILLINOIS, }
County — Cook, } ss :

Pleas before the Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 20th day) of June, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

Present : Honorable M. F. Tuley, one of the judges of the circuit court of Cook county, State of Illinois ; Julius S. Grinnell, State's attorney ; Canute R. Matson, sheriff.

Attest : HENRY BEST, *Clerk*.

Be it remembered that heretofore, to wit, on the 25th day of August, A. D. 1887, there was filed in said court a certain notice, and the following order was made and entered of record in said court ; which said notice and order are in the words and figures following, to wit :

STATE OF ILLINOIS, }
County of Cook, } ss :

In the Circuit Court of said County.

ELIZABETH KIRCHOFF

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF MAINE.

} In Chancery.

To Messrs. Swett, Grosscup & Swett, solicitors for defendant :

Please take notice that on Thursday, the 25th day of August, 1887, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, we shall, before his honor Judge Williamson, in the room usually occupied by him as a court-room in said county, ask for leave to restore the files in the above-entitled cause by filing a copy of the original bill in place of said original, which is mislaid or lost, at which time and place you can appear if you see fit.

W. S. HARBERT AND

GEO. R. DALEY,

Solicitors for Compl't.

Chicago, August 24th, 1887.

5 Service of the above notice accepted this 24th day of August, 1887.

SWETT, GROSSCUPP & SWETT.

Order.

ELIZABETH KIRCHOFF
 vs.
 THE UNION MUTUAL LIFE INSURANCE COMPANY. } Bill. 41522, 129.

This cause coming on to be further heard upon the motion of the complainant to restore certain of the files in said cause, and it appearing to the court that due notice of such application has been given to solicitors of the defendant, and said solicitors being present herein in court, and it further appearing that the original bill in this cause is lost or has been mislaid, and that a certain copy presented to the court is a true copy in substance of said original, it is ordered that said copy be filed instead of said original bill, to take the place thereof in all proceedings herein with like credit, force, and effect as said original.

And thereupon, on the same day, to wit, the 25th day of August, A. D. 1887, there was filed in the said court a certain bill of complaint, which is in the words and figures following, to wit:

Bill.

STATE OF ILLINOIS, } ss:
 County of Cook, }

In the Circuit Court of the said County of Cook.

To the honorable the judges of circuit court of the county of Cook, in chancery sitting:

Humbly complaining, sheweth unto your honors your oratrix, Elizabeth Kirchoff, wife of Julius Kirchoff, of Chicago, in said county, that on or about the eighth day of May, 1871, your oratrix, together with her said husband, borrowed of the Union Mutual Life Insurance Company, a corporation subsisting under the laws of the State of Maine, the sum of sixty thousand dollars, and to secure the payment thereof, with interest thereon, executed their promissory note, jointly and severally with one Angela Diversey, the mother of your oratrix, for said sum of money, payable to said company, and also a trust deed (to Levi D. Boone, as trustee) of a large amount of real estate in said county belonging to your oratrix, including, among other lots and parcels, the following-described lots of land, situate in Chicago, in said county, and known as lots two (2) and four (4), in block twenty-one (21), of the canal trustees' subdivision of the south fractional quarter section three (3), township thirty-nine (39) north, range fourteen (14) east, of the third principal meridian.

That afterwards, to wit, some time during the year eighteen hundred and seventy-eight, default having been made in the
 6 payment of said money, the said insurance company threatened to institute proceedings for the foreclosure of said trust deed and a sale of the real estate of your oratrix therein described.

That thereupon your oratrix, through her said husband as her agent, offered said company to release and quitclaim to said company all and singular her land and premises in said trust deed described, provided said company would allow your oratrix to redeem from said trust deed the said two lots of land hereinbefore specifically described (one of which said lots was then, at that time occupied by your oratrix as a homestead) upon payment of whatever sum of money the said lots, with the improvements thereon, should be valued by an appraiser, to be agreed upon by said company and your oratrix, and upon such terms of payment as the said company were at or about that time offering to purchasers of its real estate, to wit, in ten equal annual payments or installments, with interest until paid at the rate of six per cent. per annum, and to secure the payment of such instalments by a mortgage upon said lots, and provided, also, that the said company should take the land in said trust deed described belonging to your oratrix in full satisfaction of any claim of said company against your oratrix and her said husband on account of said promissory note and trust deed.

That the said company accepted said offer and agreed to allow such redemption of said two lots by your oratrix upon the terms proposed and for the consideration aforesaid.

That thereupon said company, in pursuance of said agreement, designated one James H. Rees, of said Chicago, as a proper and competent person to appraise the said two lots of land, and your oratrix, through her said husband, assented to the employment of said Rees for such purposes.

That thereupon the said Rees, together with one E. A. Warfield, the financial agent of said company, and R. B. Kendall, the attorney for said company, and your oratrix's said husband, visited said lots, your oratrix contributing to the expense of said appraisal, and the said Rees, after having viewed the said two lots, appraised the same as follows, to wit, said lot two (2), with the improvements thereon, at the sum of seven thousand five hundred dollars (\$7,500) and said lot four (4) at the sum of two thousand five hundred dollars, of which appraisal the said Rees made report in writing to said company and of which the said company notified your oratrix, which said report, as your oratrix is informed and believes, is now in the possession of said company and to which your oratrix prays leave to refer.

That thereafter, upon examination of the title to said lots, it appeared that there were certain intervening liens and incumbrances upon the same, created after the execution of said trust deed and prior to the agreement hereinbefore set forth for such redemption by your oratrix; and it was thereupon represented to your oratrix by said company, through its attorney, that it would be necessary to foreclose said trust deed in order to make good title in said company to said lots of land before it could take a mortgage

thereon for said installments of redemption money, and it was thereupon agreed by and between the said company and your oratrix that the agreement for said redemption should not be executed until after the title had been perfected in said company

by said foreclosure proceedings, but should be held in abeyance until after such foreclosure proceedings should be completed and the title to said lots become vested in said company discharged of such incumbrances, &c., but that in the meantime your oratrix should execute and deliver to said company her deed of release and quitclaim as agreed upon and should interpose no defense to such foreclosure proceedings.

That afterwards, pursuant to the agreement aforesaid, your oratrix and her said husband executed, acknowledged, and delivered to said company a deed of release and quitclaim of all and singular the land and premises belonging to your oratrix described in said trust deed, including the said two lots hereinbefore specifically described, in and by which said deed it was in effect stipulated by your oratrix that said deed should not be construed to effect the right of said company to foreclose said trust deed, which said deed, as your oratrix is informed and believes, has since then been recorded in the recorder's office of said county, and to said deed or the record thereof your oratrix prays leave to refer, if it be necessary so to do.

And your oratrix further shows unto your honors that the said company, in pursuance of said agreement, afterwards prosecuted its suit in the circuit court of the United States for the northern district of Illinois for the foreclosure of said trust deed and obtained a decree of foreclosure and sale, under and by virtue of which said decree said lots were afterwards, to wit, on the 20th day of October, A. D. 1880, offered for sale by the master in chancery of said court, and were sold and struck off to said company as the highest bidder at said sale as follows, to wit, said lot two (2) for the sum of nine thousand dollars (\$9,000) and said lot four (4) for the sum of eight thousand dollars (\$8,000), and that deeds of said lots have been issued and delivered to said company by the said master in chancery and have been recorded in said recorder's office.

That in said suit for foreclosure the said company procured the appointment of a receiver of all the land and premises involved in said suit, your oratrix making no defence to said suit, and that afterwards said receiver demanded possession of said lot two (2) which was occupied by your oratrix and her husband as a homestead, and applied to said court for a writ of assistance to put his said receiver in possession thereof.

That thereupon your oratrix, through her said husband, resisted said application for said writ of assistance and set up as defense to the application of said receiver an answer setting forth in substance the aforesaid agreement between said company and your oratrix, but said company, through its solicitors employed in said suit, supported the application of said receiver and wholly disregarded its agreement with your oratrix and procured the order of said
8 court for the assistance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead.

And your oratrix well hoped that upon the execution and delivery of said master's deeds of said lots to said company (which said deeds were issued on or about the twenty-first day of January, A. D. 1882) the said company would, in good faith, keep and perform its

said agreement with your oratrix and convey said two lots to your oratrix upon the terms aforesaid.

But now so it is that the said Union Mutual Life Insurance Company utterly refuses to carry out its said agreement with your oratrix and falsely and fraudulently claims to hold and own said two lots of land in fee-simple, absolute, free, and discharged of any equitable interest therein on the part of your oratrix, and seek to de-ri-ve your oratrix of her rights in the premises and refuses to convey to your oratrix the said lots of land or either of them upon the terms agreed upon as aforesaid, and gives out and pretend that no such agreement was ever made or entered into between said company and your oratrix ; whereas your oratrix charges the contrary to be the truth, and that she is justly entitled to a conveyance of said lots from said company upon the terms aforesaid.

And your oratrix further shows unto your honors that she has in good faith kept and performed her part of said agreement for the redemption of said lots, so far as she has been able to do, by the delivering of her said deed of release and quitclaim to said company in full faith and reliance that the said agreement would be kept and performed by said company, and that she has always been and is now ready and willing to keep and perform the whole of said agreement on her part to be performed, but has been prevented by said company from so doing.

All which actings, doings, and pretences of said company are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your oratrix in the premises.

In farther consideration whereof and forasmuch as your oratrix is remediless in the premises at and by the strict rules of the common law and is relievable only in a court of equity, where such things are perfectly cognizable and relievable, to the end, therefore, that the said Union Mutual Insurance Company may true answer make to all and singular the premises (but not under oath, the benefit whereof is expressly waived by your oratrix), and may be compelled by the decree of this court specifically to perform the said agreement with your oratrix and convey to her the said two lots of land hereinbefore specifically described, your oratrix being ready and willing and duly offering specifically to perform the said agreement in all things on her part, and that your oratrix may have such other and farther relief in the premises as the equities of her case may require and to your honors shall seem meet :

May it please your honors to grant unto your oratrix the people's writ of assistance of subpoena, directed to the said Union Mutual Life Insurance Company, commanding said company, at a certain day and under a certain penalty, to appear before your honors in this honorable court and there and then full, true, direct, and perfect answer make to all and singular the premises ; and, further, to stand to, perform, and abide such further order and decree therein as to your honors shall seem meet.

And your oratrix will ever pray, etc.

ELIZABETH KIRCHOFF.

W. S. HARBERT,

Solicitor for Complainant.

STATE OF ILLINOIS, }
 County of Cook, } ss:

Geo. R. Daley, being duly sworn, on oath says that he is well acquainted with the contents of the original bill filed in the case of Elizabeth Kirchoff against The Union Mutual Life Insurance Company, in the circuit court of Cook county, and that the foregoing is a true copy in substance of said original bill.

Affiant further says that he has made diligent search for said original bill, but has been unable to find the same.

GEO. R. DALEY.

Subscribed and sworn to before me this 25th day of August, A. D. 1887.

JOHN STIRLEN, [NOTARIAL SEAL.]
Notary Public.

And be it remembered that heretofore, to wit, on the 12th day of June, A. D. 1882, there issued out of and under the seal of said court the people's writ of summons, directed to the sheriff of Cook county to execute; which said writ, with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

Summons.

STATE OF ILLINOIS, }
 County of Cook, } ss:

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon the Union Mutual Life Insurance Company, if it shall be found in your county, personally to be and appear before the circuit court of Cook county on the first day of the term thereof to be holden at the court-house, in Chicago, in said Cook county, on the third Monday of July, A. D. 1882, to answer unto Elizabeth Kirchoff in her certain bill of complaint filed in said court on the chancery side thereof.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Jacob Gross, clerk of said court, and [OFFICIAL SEAL.] the seal thereof, at Chicago, in said county, this 12th day of June, A. D. 1882.

JACOB GROSS, *Clerk.*

10 Endorsed: Served this writ on the within-named Union Mutual Life Insurance Company by delivering a copy of this writ to Leonard Swett, attorney for said company, this 13th day of June, 1882, the president of said company not found in my county. O. L. Mann, sheriff, by J. H. Burke, deputy.

And afterwards, to wit, on the 22nd day of June, A. D. 1882, there was filed in said court a certain demurrer, which is in the words and figures following, to wit:

Demurrer.

In the Circuit Court of Cook County, June Term, A. D. 1882.

ELIZABETH KIRCHOFF, Complainant,

vs.

UNION MUTUAL LIFE INSURANCE CO., Defendant.

} In Chancery.

The demurrer of Union Mutual Life Ins. Co., defendant, to the bill of complaint of Elizabeth Kirchoff, the above-named plaintiff.

STATE OF ILLINOIS, }
Cook County, } ss :

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer sheweth that the said complainant hath not in and by her said bill made or stated such a case as doth or ought to entitle her to any such discovery or relief as is thereby sought and prayed for from or against this defendant, in that the said bill does not show a valid contract concerning the said land described in said bill of complaint and one which can be enforced neither in law or in a court of equity.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demand the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

SWETT AND HASKELL,

Solicitors for Defendant.

And thereupon, on the 19th day of February, A. D. 1883, the following proceedings were had and entered of record in said court, to wit :

Order.

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

} 41522, 973. Bill.

This day came the parties, by their respective solicitors, and thereupon came on to be heard the demurrer of the defendant to the complainant's bill of complaint in this cause, which was argued by counsel, and the court, being now fully advised in the premises, doth overrule the said demurrer and doth grant the defendant twenty days from date in which to answer herein.

And thereupon, on the 9th day of March, A. D. 1883, there was filed in said court a certain answer, which is in the words and figures following, to wit:

Answer.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF	}	In Chancery. February Term, 1883.
<i>ats.</i>		
THE UNION MUTUAL LIFE INSURANCE		
COMPANY.		

The answer of The Union Mutual Life Insurance Company, defendant, to the bill of complaint of Elizabeth Kirchoff, complainant.

This defendant, reserving to itself all rights of exceptions to the said bill of complaint, for answer thereto says it admits that on or about the 8th day of May, 1871, said complainant, together with her husband, borrowed of this defendant the sum of sixty thousand dollars, and to secure the payment thereof executed the note and trust deed as in said bill set forth.

This defendant, further answering, says that it denies that said complainant, through her husband or any one else, offered said company to release and quitclaim to defendant the lands and premises in said trust deed described provided said defendant would allow said complainant to redeem the two lots in said bill described from said trust deed upon the payment of whatever sum of money the said lots, with the improvements thereon, should be valued at by an appraiser to be agreed upon by the parties and upon the terms in said bill set forth or any other terms; and said defendant says that it denies that it accepted said pretended offer or any offer from said complainant, and denies that it agreed to allow such redemption of said two lots by said complainant upon any terms or for any consideration whatever. Said defendant denies that in pursuance of the agreement set forth in said bill it designated one James H. Rees as a proper person to appraise said lands; and said defendant has no information that said Rees, Warfield, and Kendall made any appraisal of said lots, as in said bill set forth, or that said complainant contributed to the expenses of such appraisal, and therefore denies the same.

Said defendant admits that there were incumbrances and liens on said lots other than the lien of said defendant and subsequent thereto, but defendant denies that it represented to the said complainant that it would be necessary to foreclose said trust deed before it could take a mortgage thereof for said pretended instrument of redemption money, as in said answer set forth; and said defendant denies that it at any time agreed with said complainant that the agreement for redemption, as averred in said bill, should not be performed until after the title to said lots had been perfected in said defendant; and said defendant denies that it

agreed with said complainant that said agreement for redemption, as averred in said bill, should be held in abeyance until foreclosure proceedings should be completed and the title to said lots vested in said defendant discharged of the incumbrances.

And defendant denies that said complainant agreed that she would not interpose any defense to said foreclosure proceeding.

Said defendant denies that said complainant executed and delivered to said defendant any deed of release and quitclaim to said premises in pursuance of the agreement for redemption, set forth in said bill.

Said defendant admits that it prosecuted its suit for foreclosure in the circuit court of the United States and obtained a decree and purchased said property, as in said bill set forth, but denies that the same was done in pursuance of any agreement with said complainant. Said defendant admits that a receiver was appointed in said suit and obtained possession of said lots, but has no knowledge that the said defendant's solicitor in said suit procured the order compelling said complainant to vacate the said lots, and therefore denies the same. This defendant admits that it refused to convey said lots to said complainant, but denies that it seeks to deprive said complainant of any right belonging to her, and denies that its claim to said lots is false or fraudulent.

Said defendant denies that said complainant has in good faith kept and performed her part of said alleged agreement for redemption of said lots, and denies that the delivery of said deed of quitclaim and release by complainant to said defendant was upon the faith and reliance that the said alleged agreement of redemption would be kept and performed by said defendant, and denies that said complainant has heretofore or is now ready to perform her part of said alleged agreement, and said defendant says that said complainant has at no time made any tender of any amount whatever to said defendant.

And this defendant, further answering, says that by the statute of frauds and perjuries of the State of Illinois it is, among other things, provided that no action shall be brought whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments or any interest in or concerning them unless the agreement upon which such action should be brought, or some memorandum or note in writing, shall be signed by said party to be charged therewith or some other person by him lawfully authorized; and this defendant says that the pretended agreement set forth in the bill of complainant was not reduced to writing or signed by this defendant or by any one authorized by it so to do; and this defendant insists upon said statute and claims the same benefit as if *he* had

pleaded the same; and this defendant, further answering,
 13 denies that the complainant is entitled to the relief or any part thereof in said bill of complaint demanded and prays the same advantage of this answer as if it had pleaded or demurred to said bill of complaint, and prays to be dismissed with *his* reasonable costs and charges in this behalf wrongfully sustained.

SWETT AND HASKELL,

Sol's for Def't.

And afterwards, to wit, on the 17th day of March, A. D. 1883, there was filed in said cause a certain replication, which is in the words and figures following, to wit:

Replication.

STATE OF ILLINOIS, } ss :
Cook County, }

In the Circuit Court of said County, February Term.

ELIZABETH KIRCHOFF
vs.
THE UNION MUTUAL LIFE INSURANCE COMPANY. } In Chancery.

The replication of Elizabeth Kirchoff, complainant, to the answer of The Union Mutual Life Insurance Company, defendant.

This repliant, saving and reserving unto herself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says—

That she will aver and prove her said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by the repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by her said bill she has already prayed.

W. S. HARBERT,
Sol. for Complainant.

And afterwards, to wit, on the 21st day of March and the 26th day of June, A. D. 1883, the 21st day of September, A. D. 1885, and the 29th day of September, A. D. 1886, and the 10th day of March, A. D. 1887, the following, among other, proceedings were had and entered of record in said court, to wit:

14 *Order of March 21, '83.*

ELIZABETH KIRCHOFF
vs.
UNION MUTUAL LIFE INSURANCE COMPANY. } 41522, 973. Bill.

On motion of solicitor for the complainant, it is ordered that this cause be, and it hereby is, referred to Arno Voss, Esq., one of the masters in chancery of this court, to take proof of all the material allegations in the said bill contained and report the same to this court with all convenient speed.

Order of June 26, 1883.

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

} 41522, 973. Bill.

And now, on this day, this cause coming on to be heard on the motion of complainant to require defendant and its solicitors, Swett and Haskell, to produce, upon the taking of testimony herein before Arno Voss, Esq., one of the masters in chancery of this court, the books and writings hereafter referred to, and it appearing to the court that such books and writings are material as evidence and pertinent to the issues in this cause, and it further appearing that good and sufficient cause has been shown for such application and order, that reasonable notice of such application has been given, and that such books and writings are in the possession or under the control of said defendant and its said solicitors, and the court, being fully advised in the premises, doth order, adjudge, and require the said defendant and its solicitors, Swett and Haskell, to produce before Arno Voss, Esq., one of the masters in chancery of this court, for use by complainant upon the taking of testimony upon the reference heretofore made herein, the following books and writings, namely :

A certain appraisement in writing made by one James H. Rees, being a valuation by said Rees of the property and premises in the bill described, which appraisement bears date the latter part of 1878.

Certain letters and letter-press copies of letters written by the agent of said defendant at Chicago and mailed by said agents to the home office or principal place of business of said company; said letters relate to the loan by said company to the complainant or relate to the premises securing such loan and relating to business transactions between said company and complainant; the letters above embrace all correspondence between the Chicago office and the home office of defendant relating to the Kirchoff loan and matters growing out thereof and pertaining to the transactions set out in the bill herein, &c.

15 A certain deed sent by the officers or agents of said company at Chicago to the home office (not executed), being a conveyance of the property in the bill described to the complainant.

Order, September 21, 1885.

ELIZABETH KIRCHOFF

v.

UNION MUTUAL LIFE INSURANCE COMPANY.

} 41522, 264. Bill.

On motion of the solicitor for the complainant and notice filed, this cause is set for hearing on the next trial calendar of this court.

Order of Sept. 29, 1886.

ELIZABETH KIRCHOFF	}	41522, 129. Bill.
vs.		
UNION MUTUAL LIFE INSURANCE COMPANY.		

By agreement of parties, this cause is passed on the trial calendar of this court.

Order of March 10th, 1887.

ELIZABETH KIRCHOFF	}	41522, 129. Bill.
v.		
UNION MUTUAL LIFE INSURANCE COMPANY.		

On motion of solicitors for the complainant, it is ordered that leave be, and it hereby is, granted the complainant to amend her bill of complaint instanter.

And on motion of solicitor for defendant it is further ordered that the answer on file stand as the answer of the defendant to the amended bill.

And on motion of solicitor the replication on file to stand to the answer to said amended bill.

And thereupon, on the same day, to wit, the 10th day of March, A. D. 1887, there was filed in said cause a certain amended bill, which is in the words and figures following, to wit:

STATE OF ILLINOIS, {
County of Cook, } ss :

In the Circuit Court of the said County of Cook.

To the honorable the judges of the circuit court of said county, in chancery sitting :

Humbly complaining, sheweth unto your honors your oratrix, Elizabeth Kirchoff, wife of Julius Kirchoff, of Chicago, in said county, that on or about the eighth day of May, 1871, your oratrix, together with her said husband and her mother, Angela Diversey, borrowed of the Union Mutual Life Insurance Company, a corporation subsisting under the laws of the State of Maine, the sum of sixty thousand (\$60,000) dollars, and to secure the payment thereof, with interest thereon, executed their promissory note jointly and severally for said sum of money, payable to said company, and also a trust deed (to Levi D. Boone, as trustee) of a large amount of real estate in said county belonging to your oratrix, including, among other lots and parcels, the following-described lots of land, situated in Chicago, in said county, and known as lots two (2) and four (4), in block twenty-one (21), of the canal trustees' subdivision of the south fractional quarter section

three (3), township thirty-nine (39) north, range fourteen (14) east, of the third principal meridian.

That afterwards, to wit, some time during the year eighteen hundred and seventy-eight (1878), default having been made in the payment of said money, the said insurance company instituted proceedings for the foreclosure of said trust deed and a sale of the real estate of your oratrix therein described.

That thereupon your oratrix, through her said husband, as her agent, offered said company to release and quitclaim to said company all and singular her land and premises in said trust deed described, provided said company would allow your oratrix to redeem from said trust deed that said two lots of land hereinbefore specifically described (one of which said two lots was at that time occupied by your oratrix as a homestead) upon payment of whatever sum of money the said lots, with the improvements thereon, should be valued — by an appraiser to be agreed upon by said company and your oratrix, and upon such terms of payment as the said company were at or about that time offering to purchasers of its real estate, to wit, in ten equal annual payments or instalments, with interest until paid at the rate of six per cent. per annum, and to secure the payment of such instalments by a mortgage or trust deed upon said lots, and provided also that that said company should take the land in said trust deed described belonging to your oratrix in full satisfaction of any claim of said company against your oratrix and her said husband on account of said promissory note and trust deed.

That the said company accepted said offer and agreed to allow such redemption of said two lots by your oratrix upon the terms proposed and for the consideration aforesaid.

That thereupon said company, in pursuance of said agreement, designated one James H. Rees, of said city of Chicago, as a proper and competent person to appraise the said two lots of land, and your oratrix, through her said husband, assented to the employment of said Rees for such purposes.

That thereupon the said Rees, together with one E. A. Warfield, the financial agent of said company, and R. B. Kendall, the attorney for said company, and your oratrix's said husband, visited said lots, your oratrix contributing to the expense of said appraisal, and the said Rees, after having viewed the said two lots, appraised the same as follows, to wit, said lot two (2), with the improvements thereon, at the sum of seven thousand five hundred
17 dollars (\$7,500), and said lot four (4) at the sum of two thousand five hundred dollars, of which appraisals the said Rees made report in writing to said company and of which the said company notified your oratrix, which said report, as your oratrix is informed and believes, is now in the possession of said company, and to which your oratrix prays leave to refer.

That afterwards, pursuant to the agreement aforesaid, your oratrix and her said husband executed, acknowledged, and delivered to said company a deed of release and quitclaim of all and singular the land and premises belonging to your oratrix described in said

trust deed, including the said two lots hereinbefore specifically described, which said deed, as your oratrix is informed and believes, has since then been recorded in the recorder's office of said county, and to said deed or the record thereof your oratrix prays leave to refer if it be necessary so to do.

That thereafter, upon examination of the title to said lots, it appeared that there were certain intervening liens and incumbrances upon the same, created after the execution of said trust deed and prior to the agreement hereinbefore set forth for such redemption by your oratrix, and it was thereupon represented to your oratrix by said company, through its attorney, that it would be necessary to foreclose trust deed in order to make good title in said company to said lots of land before it could take mortgage thereof for said instalments of redemption money, and it was thereupon agreed by and between the said company and your oratrix that the agreement for said redemption should not be further performed until after the title had been perfected in said company by said foreclosure proceedings, but the further execution thereof should be held in abeyance until after such foreclosure proceedings should be completed and the title to said lots become perfected in said company discharged of such incumbrances, &c., and that in the meantime your oratrix should interpose no defense to such foreclosure proceedings.

And your oratrix further shows unto your honors that the said company, in pursuance of said agreement, afterwards continued the prosecution of its suit in the circuit court of the United States for the northern district of Illinois for the foreclosure of said trust deed and obtained a decree of foreclosure and sale, under and by virtue of which said decree said lots were afterwards, to wit, on the 20th day of October, A. D. 1880, offered for sale by the master in chancery of said court and were sold and struck off to said company at said sale as follows, to wit, said lot two (2) for the sum of nine thousand dollars (\$9,000) and said lot four (4) for the sum of eight thousand dollars (\$8,000), and that deeds of said lots have since been issued and delivered to said company by the said master in chancery and have been recorded in said recorder's office.

That in said suit for foreclosure the said company procured the appointment of a receiver of all the land and premises involved in said suit, your oratrix making no defense to said suit, and that on, to wit, the 16th day of November, 1881, said receiver demanded
18 possession of said lot two (2), which was occupied by your
oratrix and her husband as a homestead, and applied to said
court for a writ of assistance to put him, said receiver, in possession thereof.

That thereupon your oratrix, through her said husband, resisted said application for said writ of assistance and set up as defence to the application of said receiver an answer setting forth in substance the aforesaid agreement between said company and your oratrix, but said company, through its solicitors employed in said suit, supported the application of said receiver, and wholly disregarded its agreement with your oratrix and procured order of said

court for the assistance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead.

And your oratrix well hoped that upon the execution and delivery of said master's deeds of said lots to said company (which said deeds were issued on or about the twenty-first day of January, A. D. 1882) the said company would in good faith keep and perform its said agreement with your oratrix and convey said two lots to your oratrix upon the terms aforesaid.

But now so it is the said Union Mutual Life Insurance Company utterly refuses to carry out its said agreement with your oratrix and falsely and fraudulently claims to hold and own said two lots of land in fee-simple absolute, free and discharged of any equitable interest therein on the part of your oratrix, and seek to deprive your oratrix of her rights in the premises and refuses to convey to your oratrix the said lots of land or either of them upon the terms agreed upon as aforesaid and gives out and pretends that no such agreement was ever made or entered into between said company and your oratrix.

Whereas your oratrix charges the contrary to be the truth, and that she is justly entitled to redemption of said lots and a conveyance from said company upon the terms aforesaid.

And your oratrix further shows unto your honors that she has in good faith kept and performed her part of said agreement for the redemption of said lots, so far as she has been able to do, by the delivering of her said deed of release and quitclaim to said company, and has refrained from interposing any defense to said foreclosure proceedings in full faith and reliance that the said agreement would be kept and performed by said company, and that she has always been and is now ready and willing to keep and perform the whole of said agreement on her part to be performed.

All which actings, doings, and pretences of said company is contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your oratrix in the premises.

In further consideration whereof, and forasmuch as your oratrix is remediless in the premises at and by the strict rules of the common law and is receivable only in a court of equity, where such things are perfectly cognizable and receivable, to the end, therefore, that said Union Mutual Life Insurance Company may true answer make to all and singular the premises (but not under oath, the

benefit whereof is expressly waived by your oratrix); that
 19 your oratrix may be allowed to redeem said premises according to the terms of said agreement; that said defendant may be compelled by the decree of this court to perform the said agreement with your oratrix and convey to her the said two lots of land hereinbefore specifically described according to the terms thereof, as before stated, and account to your oratrix for the rents and profits of said premises since the date of said agreement, your oratrix being ready and willing and duly offering to perform the said agreement in all things on her part, and that your oratrix may have such other and further relief in the premises as the equities of her case may require and to your honors shall seem meet—

May it please your honors to grant unto your oratrix the people's writ of summons in chancery, directed to the sheriff of said county of Cook, commanding him that he summon the defendant, The Union Mutual Life Insurance Company, to appear before this honorable court on the first day of the July term thereof, to be held in the court-house, in Chicago, in said county, on the third Mouday of July, A. D. 1882, then and there to answer this bill, &c.; and, as in duty bound, your oratrix will ever pray.

ELIZABETH KIRCHOFF,

By W. S. HARBERT, *Her Solicitor*.

W. S. HARBERT,

GEO. R. DALEY,

Solicitors for Complainant.

And afterwards, on the 12th day of July, A. D. 1887, there was filed in said cause a certain proposed amended bill, which is in the words and figures following, to wit:

Proposed Amended Bill.

STATE OF ILLINOIS, }
County of Cook, } ss:

In the Circuit Court of said County.

To the honorable the judges of the circuit court of said county of Cook, in chancery sitting:

Humbly complaining, sheweth unto your honors your oratrix, Elizabeth Kirchoff, wife of Julius Kirchoff, of Chicago, in said county, that on or about the eighth day of May, 1871, your oratrix, together with her said husband and her mother, Angelo Diversey, borrowed of the Union Mutual Life Insurance Company, a corporation subsisting under the laws of the State of Maine, the sum of sixty thousand dollars (\$60,000), and to secure the payment thereof, with interest thereon, executed their promissory note, jointly and severally, for said sum of money, payable to the said company, and also a trust deed (to Levi D. Boone as trustee) on a large amount of real estate in said county belonging to your oratrix, including, among other lots and parcels, the following-described lots of land, situated in Chicago, in said county, and known as lots two
20 (2) and four (4), in block twenty-one (21), of the canal trustees' subdivision of the south fractional quarter of section three (3), township thirty-nine (39) north, range fourteen (14) east, of the third principal meridian.

That afterwards, to wit, some time during the year eighteen hundred and seventy-eight (1878), default having been made in the payment of said money, the said insurance company instituted proceedings for the foreclosure of said trust deed and a sale of the real estate of your oratrix therein described.

That thereupon your oratrix, through her said husband as her

agent, offered said company to release and quitclaim to said company all and singular her land and premises in said trust deed described, provided said company would allow your oratrix to redeem from said trust deed said two lots of land hereinbefore specifically described (one of which two lots was at that time occupied by your oratrix as a homestead) upon payment of whatever sum of money the said lots, with the improvements thereon, should be valued at by an appraiser, to be agreed upon by said company and your oratrix, and provided also that said company should take the remainder of the land in said trust deed described belonging to your oratrix (other than the two before-mentioned lots) in full satisfaction of the indebtedness of your oratrix to said defendant beyond the amount at which said two lots should be so appraised; that said company accepted said offer and agreed to allow such redemption of said lots by your oratrix upon the terms proposed and for the consideration aforesaid.

That it was further agreed by and between your oratrix and said defendant, and in further consideration for such surrender and conveyance by her, that after receiving the said quitclaim deed from your oratrix the said defendant company would execute back to her a deed of conveyance of the two lots before described, and that your oratrix should be allowed to pay said redemption money in like manner and upon such terms as said company were at or about that time offering to purchasers of their real estate, to wit, in ten equal annual instalments, with interest at the rate of six per cent. per annum until paid, the first of which instalments was to be paid upon the delivery of the deed to your oratrix and the remainder in one, two, three, four, five, six, seven, eight, and nine years thereafter, respectively, said deferred payments to bear interest at the rate of six per cent. per annum until paid, and that to secure said deferred payments your oratrix would execute and deliver to said defendant a mortgage on said two lots.

That thereupon said company, in pursuance of said agreement, designated one James H. Rees, of said city of Chicago, as a proper and competent person to appraise the said two lots of land, and your oratrix, through her said husband, assented to the employment of said Rees for such purpose.

That thereupon the said Rees, together with one E. A. Warfield, the financial agent of said company, and R. B. Kendall, the attorney for said company, and your oratrix's said husband, visited said lots, your oratrix contributing to the expense of said appraisal, and the

21 said Rees, after having viewed the said two lots, appraised the same as follows, to wit: said lot two (2), with the improvements thereon, at the sum of seven thousand five hundred dollars (\$7,500) and said lot four (4) at the sum of two thousand five hundred dollars, of which appraisals the said Rees made report in writing to said company and of which the said company notified your oratrix, which said report, as your oratrix is informed and believes, is now in the possession of said company, and to which your oratrix prays leave to refer.

That afterwards, pursuant to the agreement aforesaid, your ora-

trix and her said husband executed, acknowledged, and delivered to said company a deed and quitclaim of all and singular the land and premises belonging to your oratrix described in said trust deed, including the said two lots hereinbefore specifically described, which said deed, as your oratrix is informed and believes, has since then been recorded in the recorder's office of said county, and to said deed or the record thereof your oratrix prays leave to refer if it be necessary so to do.

That thereafter, upon examination of the title to said lots, it appeared that there were certain intervening liens and incumbrances upon the same, created after the execution of said trust deed and prior to the agreement hereinbefore set forth for such redemption by your oratrix, and it was thereupon represented to your oratrix by said company, through its attorneys, that it would be necessary to foreclose said first-described trust deed in order to make good title in said company to said lots of land before it could take a mortgage thereon for said instalments of redemption money, and it was thereupon agreed by and between the said company and your oratrix that the agreement for said redemption should not be further performed until after the title had been perfected in said company by said foreclosure proceedings, but the further execution thereof should be held in abeyance until after such foreclosure proceedings should be completed and the title to said lots become perfected in said company discharged of such incumbrances, &c., and that in the meantime your orator should interpose no defense to such foreclosure proceedings.

And your oratrix further shows unto your honors that the said company in pursuance of said agreement continued the prosecution of its suit in the circuit court of the United States for the northern district of Illinois for the foreclosure of said trust deed and obtained a decree of foreclosure and sale under and by virtue of which said decree said lots were afterwards, to wit, on the 20th day of October, A. D. 1880, offered for sale by the master in chancery of said court and were sold and struck off to said company at said sale as follows, to wit, said lot two (2) for the sum of nine thousand dollars (\$9,000) and said lot four (4) for the sum of eight thousand dollars (\$8,000), and that deeds of said lots have since been issued and delivered to said company by the said master in chancery and have been recorded in said recorder's office.

That in said suit for foreclosure the said company procured the appointment of a receiver of all the land and premises involved in said suit, your oratrix making no defense to said suit, and
22 that afterwards, on, to wit, the 16th day of November, 1881, said receiver demanded possession of said lot two (2) which was occupied by your oratrix and her husband as a homestead and applied to said court for a writ of assistance to put him, said receiver, in possession thereof.

That thereupon your oratrix, through her said husband, resisted said application for said writ of assistance and set up as a defense to the application of said receiver an answer setting forth in substance the aforesaid agreement between said company and your oratrix

but said company, through its solicitors in said suit, supported the application of said receiver and wholly disregarded its agreement with your oratrix and procured an order of said court for the assistance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead.

And your oratrix well hoped that upon the execution and delivery of said master's deeds of said lots to said company (which said deeds were issued on or about the twenty-first day of January, A. D. 1882) the said company would in good faith keep and perform its said agreement with your oratrix and convey said two lots to your oratrix upon the terms aforesaid.

But now so it is that said Union Mutual Life Insurance Company utterly refuses to carry out its said agreement with your oratrix and falsely and fraudulently claims to hold and own said two lots of land in fee-simple, absolute, free, and discharged of any equitable interest therein on the part of your oratrix, and seeks to deprive your oratrix of her rights in the premises, and refuses to convey to your oratrix the said lots of land or either of them upon the terms agreed upon as aforesaid, and gives out and pretends that no such agreement was ever made or entered into between said company and your oratrix, whereas your oratrix charges the contrary to be the truth and that she is justly entitled to a redemption of said lots and a conveyance from said company upon the terms aforesaid.

And your oratrix further shows unto *unto* your honors that she has in good faith kept and performed her part of said agreement for the redemption of said lots, so far as she has been able to do, by the delivering of her said deed of release and quitclaim to said company, and has refrained from interposing any defense to said foreclosure proceedings in full faith and reliance that the said agreement would be kept and performed by said company, and that she has always been and is now ready and willing to keep and perform the whole of said agreement on her part to be performed.

All which actings, doings, and pretences of said company is contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your oratrix in the premises.

In further consideration whereof, and forasmuch as your oratrix is remediless in the premises at and by the strict rules of the common law and is relievable only in a court of equity, where such things are perfectly cognizable and relievable, to the end, therefore, that said Union Mutual Life Insurance Company may true answer

make to all and singular the premises (but not under oath,

23 the benefit whereof is expressly waived by your oratrix);

that your oratrix may be allowed to redeem said premises according to the terms of said agreement; that said defendant may be compelled by the decree of this court to perform the said agreement with your oratrix and convey to her the said two lots of land hereinbefore specifically described according to the terms thereof, as before stated, and account to your oratrix for the rents and profits of said premises since the date of said agreement, your oratrix being ready and willing and duly offering to perform to said

agreement in all things on her part, and that your oratrix may have such other and further relief in the premises as the equities of her case may require and to your honors shall seem meet:

May it please your honors to grant unto your oratrix the people's writ of summons in chancery, directed to the sheriff of said county of Cook, commanding him that he summon the defendant, The Union Mutual Life Insurance Company, to appear before this honorable court on the first day of the July term thereof, to be held in the court-house, in Chicago, in said county, on the third Monday of July, A. D. 1882, then and there to answer this bill, &c.; and, as in duty bound, your oratrix will ever pray.

ELIZABETH KIRCHOFF,

By W. S. HARBERT AND
GEORGE R. DALEY,

Her Solicitors.

W. S. HARBERT &

GEO. R. DALEY,

Solicitors for Complainant.

And on the same day, to wit, the 12th day of July, A. D. 1887, the following, among other, proceedings were had and entered of record in said court, to wit:

Order of July 12th, 1887.

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

} 41522, 129. Bill and
Amended Bill.

And now, on this day, come the said parties, by their respective solicitors, and this cause coming on to be heard upon the pleadings herein and testimony adduced in open court, the court, after hearing counsel for the respective parties and being now fully advised in the premises, finds that the complainant is not entitled to the relief prayed for in her amended bill of complaint herein.

And thereupon and after the court had announced its opinion the complainant, by her solicitor, asks leave to file an amended bill herein. The court, after hearing counsel for the respective parties and being now fully advised in the premises, doth refuse leave to file an amended bill and doth order, adjudge, and decree that the amended bill in this cause be, and it hereby is, dismissed out of this court at the complainant's cost for want of equity.

24 Therefore it is ordered and considered that the defendant have and recover of the complainant its costs in this behalf expended, to be taxed, and that execution issue therefor.

And thereupon the complainant, by her solicitor, prays an appeal to the supreme court of the State of Illinois, which is granted on condition that said complainant doth within sixty days from date execute and file a good and sufficient appeal bond in this cause in the penal sum of three hundred dollars, with surety to be approved by the court.

And it is further ordered that the complainant have sixty days from date in which to prepare and file a certificate of evidence herein.

STATE OF ILLINOIS, }
Cook County, } ss :

I, Henry Best, clerk of the circuit court of Cook county and the keeper of the records and files thereof in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court, on the chancery side thereof, between Elizabeth Kirchoff, complainant, and The Union Mutual Life Insurance Company, defendant.

In witness whereof I have hereunto set my hand
[COURT SEAL.] and affixed the seal of said court, at Chicago, in said county, this 30th day of August, 1887.

HENRY BEST, *Clerk.*

In the Supreme Court of Illinois, Northern District, Sept. Term,
A. D. 1887.

ELIZABETH KIRCHOFF, Appellant,	} Assignment of Errors.
vs.	
UNION MUTUAL LIFE INSURANCE COM- PANY, Appellee.	

And now comes the said Elizabeth Kirchoff, appellant, and says that in the record and proceedings aforesaid there is manifest error in this, to wit :

1. The court erred in not entering a decree in conformity with the prayer of the bill.
2. The court erred in dismissing complainant's bill for want of equity.
3. The court erred in refusing leave to file the proposed amended bill.
4. The court erred in refusing to grant complainant any relief whatever.
5. The court erred in admitting evidence over complainant's objections.

25 By reason whereof appellant prays that said decree may be reversed, etc.

W. S. HARBERT,
GEO. R. DALEY,
Solicitors for Appellant.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, }
 County — Cook, } ss :

Pleas before the Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 20th day) of June, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

Present : Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, State of Illinois ; Julius S. Grinnell, State's attorney ; Canute R. Matson, sheriff.

Attest :

HENRY BEST, *Clerk*.

Be it remembered that heretofore, to wit, on the 3rd day of October, A. D. 1887, there was filed a certain certificate of evidence in words and figures following, to wit :

STATE OF ILLINOIS, }
 County of Cook, } ss :

In the Circuit Court of said County.

ELIZABETH KIRCHOFF, Complainant,	} In Chancery.
vs.	
THE UNION MUTUAL LIFE INSURANCE COMPANY,	
Defendant.	} 41522.

Be it remembered that at the regular term *term* of the circuit court of said county on the 9th day of March, A. D. 1887, before the Honorable Murray F. Tuley, judge of said court, sitting in chancery, came the complainant, by W. S. Harbert & Geo. R. Daley, her solicitors, and also at the same time came the defendant, by Swett, Grosscup & Swett, its solicitors, and, said cause being at issue on the bill, answer, and replication on file therein, the complainant offered and read in evidence the testimony taken and reported by Arno Voss, Esq., master in chancery, to whom said cause had theretofore been referred to take testimony and report (embracing the testimony of Julius Kirchoff, Edwin A. Warfield, Robert B. Kendall, Charles Klein, and Elizabeth Kerchoff) ; which said report and testimony are in words and figures as follows :

26 STATE OF ILLINOIS, }
County of Cook, } ss :

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF, Complainant,	}	In Chancery.
<i>vs.</i>		
THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE, Defendant.		

To the honorable the judges of the circuit court of Cook county, in the State of Illinois, in chancery sitting:

In pursuance of an order of this court made in the above-entitled cause on the twenty-first day of March, A. D. 1883, whereby it was referred to the undersigned master in chancery of this court to take the proof of the respective parties and report the same to the court—

I, the said master in chancery, do hereby respectively report that having first given a written notice to the said parties respectively of the time and place when and where the said testimony would be taken, and caused to come before me all such witnesses as the respective parties desired or — to me having represented by the solicitors of the respective parties, I did, commencing on the 13th day of April, A. D. 1883, at my office, in Chicago, of said Cook county, proceed to take the proofs of the respective parties, which examination was continued from time to time up to the present time, and, the several witnesses attending having been severally sworn by me and examined before me, I caused their testimony to be reduced to writing in short-hand and properly transcribed, and have attached the same hereto and make the same a part of this report.

I would further report that during the progress of the taking of said testimony before me the respective parties introduced in evidence before me certain letters, deeds, memoranda, and other paper-writings mentioned in the record of said testimony, which, after having been properly marked as exhibits in said cause, were, according to stipulation between the said parties, retained by them respectively, to be produced before the court upon the hearing of said cause and used as evidence therein the same as if hereto attached, which stipulation I have hereto attached, marked Exhibit "A," and made a part of this report.

All of which is respectfully submitted.

Dated this 30th day of January, A. D. 1886.

ARNO VOSS,

Master in Chancery of the Circuit Court of Cook County.

Master's fees.....	\$124 30
Stenographer's fees.....	126 40

\$250 70

Paid by complainant's solicitor.

ARNO VOSS, *Master.*

STATE OF ILLINOIS, } ss:
 Cook County,

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF }
 vs. }
 UNION MUTUAL LIFE INS. CO. }

It is hereby stipulated that the exhibits to the depositions offered in evidence — the above-entitled cause may be retained by the parties owning them, and that copies of the same in the body of the depositions or referred to as exhibits shall be taken as originals. It is also stipulated that letter-press copies of letters read in evidence by either party shall be considered as originals and that the copies of the same in the body of the depositions or set out as exhibits may be read in evidence with the same force and effect as though the original were produced, but subject to like objections.

It is also agreed that court files in the case of Union Mutual Life Ins. Co. vs. Kirchhoff in the United States court need not be attached to said depositions, but that copies thereof in the body of the depositions and of filing endorsements thereon may be read in evidence as originals and subject to the objections.

It is also stipulated that sworn copies of such files and the endorsements thereon may be introduced as originals.

It is also agreed by the defendant that any exhibits in its possession will be produced at any time on request of complainant's solicitor.

W. S. HARBERT, *Sol'r for Complainant.*
 SWETT, GROSSCUP & SWETT,
 Sol'rs for Defendant.

STATE OF ILLINOIS, } ss:
 County of Cook,

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF, Complainant, }
 vs. }
 THE UNION MUTUAL LIFE INSURANCE COMPANY, } In Chancery.
 Defendants. }

Before Arno Voss, master in chancery, circuit court, Cook county.

APRIL 13TH, 1883.

The parties met, and hearing was adjourned until the 17th inst.

W. S. Harbert, Esq., appears for complainant, and P. S. Grosscup, with Swett & Haskell, appears for defendant.

JULIUS KIRCHOFF, called as a witness on behalf of complainant, having been first duly sworn, was examined by Mr. Harbert, and testified as follows :

Q. State your name.

A. Julius Kirchoff.

Q. What is your wife's name?

A. Elizabeth.

Q. Is she the complainant in this suit?

A. Yes, sir.

Q. Have you had any dealings with the defendant, The Union Mutual Life Insurance Company of Maine?

A. Yes, sir.

Q. Were such dealings made by you on your own account or as agent for your wife?

A. As agent for my wife.

Q. Did your wife borrow some money of the Union Mutual Life Insurance Company?

A. Yes, sir.

Q. How much?

A. Sixty thousand dollars.

Q. About when was that?

A. It was in May, 1871; May 8th.

Q. Did she borrow it alone or did some one else join with her in borrowing it?

A. Mrs. Angela Diversey, my mother-in-law, joined with her. All three were in it.

Q. How was that money secured?

A. By land property.

Q. By a trust deed on land?

A. Yes, sir.

Q. Do you know who is the trustee in the trust deed?

A. I think it was Levi D. Boone first.

Q. For how many years was the loan?

A. I don't know exactly how many years we made it, but it kept on all the time. This was before the big fire, and it kept on all the time till we made that contract.

Q. What was the rate of interest, if you remember?

A. I don't know exactly how much it was at that time, when we made the loan first.

Q. What payment did you make, as you now remember, on that loan?

A. Oh, we made a great many payments. I sold one farm in 1872 and made a payment through Prussing of about three thousand dollars, \$1,500 in cash and a deferred-payment note, secured by mortgage on the farm, something over \$1,500 more.

Q. What other payments do you remember making?

29 A. Sold five acres of land afterwards and made some payments, shown in that paper.

Q. Look at the paper now shown to you and state whether that is a statement furnished you by Dr. Boone, the trustee, about May 8th, '73. (Hands same to witness.)

A. Yes, sir.

(Marked Complainant's Exhibit A.)

Q. Did you make payments after this time?

A. I don't know exactly; paid sometimes some, but don't recollect.

Q. Who were the agents of the defendant company here in Chicago from 1871 until after this trust deed which you have referred to was foreclosed.

A. Dr. L. D. Boone, E. A. Warfield, and R. B. Kendall.

Q. With which of these did you have most of your dealings?

A. Mr. Warfield.

Q. Did you or not have also dealings with Dr. Boone and Mr. Kendall?

A. Oh, yes, sir.

Q. About when did the company, through its agents here, threaten to foreclose the trust deed, if ever?

A. They were talking about it in '78; filed the bill in July, '78.

Q. Please describe generally the various tracts or parcels of property covered by the trust deed—the location of them.

A. There was a lot on Rose street, West Side; a brick building; No. 155 Fulton street.

(Objected to as not being the best evidence.)

A. In the rear of that brick building was No. 39 Leider street, a brick building; also a factory, a brick building, on Chicago avenue near Pine street; also a corner lot, Rush and Pierson streets; also another lot adjoining the same, the last two being the homestead.

Q. What was the size of the two lots together which made the homestead?

A. The corner lot is 60 by 44 feet and the other 39 by 80.

Q. They are adjoining?

A. The smaller lot is nearly in the rear of the other.

Q. Please proceed with your enumeration of the tracts of land.

A. 13 and one-tenth acres on Lincoln avenue and Diversey and other streets. I don't know exactly their names; they are called Lill's old farm—part of Lill's old farm; a large parcel on Clark street, in Gardiner's subdivision, Lake View.

Q. About how many acres were there in it?

A. I don't know. It was about 144 by 596 feet de-p. I don't know exactly. That is about all the tracts I remember. There might be two on Rose street, but I don't know. It shows it all in that paper.

Q. Did you or not, at or about the time the foreclosure proceedings were instituted on said trust deed, make any agreement with the company looking towards a settlement of matters between the complainant and the defendant?

A. Yes, sir.

Q. Please state what that agreement was.

(Objected to as incompetent and it does not appear but what the agreement is in writing.)

A. I made the contract with them. They wanted a quitclaim deed on the consideration of the two lots, our homestead, which they agreed to, and in that way we gave a quitclaim deed in 1879. We made the contract that whatever their appraisal should be of the homestead we were to pay. It was appraised, one of the lots, the corner, at \$7,500 and the other at \$2,500; it amounted to \$10,000, to be paid in ten years' time, one thousand dollars a year. They agreed to it and we gave them a quitclaim deed; then some time ago after that they tried to foreclose it. I didn't know what the attempt at foreclosure meant, as I thought the bargain was safe. I went up to the company and asked Mr. Warfield what they meant by the foreclosure. He said, "That is all right; it is exactly the same as we made the contract before; it was so much better to have it foreclosed, on account of keeping the mortgage safe for us." I saw Mr. Kendall that time, the lawyer for the company. He said he thought there were some judgments against that property, and to make it safer they had to make it safer by foreclosing, but I need not be afraid; it would be all right, and so it went on all the time, so far as I know. They told me they made out the deeds and sent them down to their headquarters; I think Boston—to their main office; whenever the deeds came back during that year they were to be delivered to us on paying \$1,000; it took some time to have it ready, on account of that foreclosure; it was at six per cent. interest.

(Answer objected to and each part of it as immaterial and incompetent.)

Q. Who first saw you with reference to getting a quitclaim deed from you and your wife of the property?

A. Mr. Warfield.

Q. Do you remember whether that was before or after the foreclosure proceedings were commenced?

A. That was before.

Q. Under your agreement were you to relinquish all claim to everything except the homestead?

(Objected to as asking for a conclusion on the witness.)

A. Oh, yes; a quitclaim deed.

Q. What were you to give up to the company?

(Objected to as asking for a conclusion of the witness.)

A. Give them the quitclaim deed and keep the homestead, the two lots.

Q. Was the quitclaim deed to include the homestead?

31 (Objected to as asking for a conclusion of the witness.)

A. Yes, sir; everything was in there.

Q. On what basis were you to be allowed to redeem the homestead?

(Objected to as asking a conclusion of the witness and as immaterial and incompetent.)

A. By appraising the lots—the homestead—which was done at seventy-five hundred dollars for one lot and \$2,500 for the adjoining lot, \$10,000, a thousand dollars a year to be paid, at six per cent. interest. By paying \$1,000 down the first year or upon their delivering the deed, as Mr. Warfield and Kendall told me, they would get the deed ready and send it up to the company.

Q. Did you mean they would get the deed ready or you would get it ready?

A. They would make the deed out and send it to their office and upon return deliver to us, paying upon the delivery of the deed or during the year one thousand dollars.

Q. Did you and the company's agents agree as to who should make the appraisement?

A. Yes, sir.

Q. Whom did you agree upon?

(Objected to as incompetent.)

A. The company had Mr. Rees.

Q. Who went with Mr. Rees, appointed to make the appraisal?

A. Mr. E. A. Warfield, Mr. Robert B. Kendall, and myself.

Q. Who furnished the team?

A. I.

Q. At how much did Mr. Rees appraise the two lots which comprised your homestead?

(Objected to as not appearing but what that appraisement is in writing.)

A. \$7,500 for the corner lot and \$2,500 the other, making \$10,000 altogether.

Counsel for complainant states that he has served counsel for defendant with notice to produce the appraisement of Mr. Rees, above referred to, and that same has not been produced under such notice at the date of taking this testimony. Counsel agree that as the defendant have not yet had time to produce said paper, if any such paper exists, therefore, in case such papers or any other papers the contents of which shall be inquired about shall be produced by the defendants under said notice, the questions and answers eliciting their contents shall be stricken out before the testimony is written up.

Q. I understand you were to have the right to retain the property upon payment of the appraisement of the homestead. On what sort of payments were you to pay the amount of the appraisement?

32 (Objected to as incompetent and calling for a conclusion of the witness.)

A. Ten years' time; \$1,000 during the first year, or upon the delivery of the deed, and one thousand dollars every year, with six per cent. interest; the first year \$1,000, or upon delivering the deed whenever the deed was ready.

Q. You were to pay \$1,000 during the first year, or when you got the deed?

A. Yes, sir.

Q. And the balance was to be paid in equal payments?

A. Yes, sir.

Q. As I understand it, you were to pay \$1,000 during the first year, or upon the delivery of the deed?

(Objected to.)

A. Yes, sir.

Q. You were to pay \$1,000 each year thereafter until the \$10,000 had been paid?

(Objected to as leading.)

A. Yes, sir; at six per cent. interest.

Q. Did you deliver your quitclaim deed to the company?

A. Yes, sir.

Q. Did the company ever convey the homestead back to you?

A. No, sir.

Q. What was said or done with regard to the making out of the deed?

Objected to as indefinite and not showing with whom the conversation was had or by whom the acts were done.

A. They said they would make it ready here and send it to their main office; Mr. Kendall would make it ready and send it to the office.

Q. Who said that?

A. Mr. Kendall and Mr. Warfield.

Q. When was that?

A. 1879.

Q. Were you informed as to whether they did send it to the main office?

A. Yes, sir; Mr. Kendall told me so.

Q. Mr. Kendall told you they had sent it?

A. Yes, sir.

(Objected to, as it does not appear that information by Mr. Kendall should bind the company.)

Q. Did the deed come back?

A. I never saw it.

Q. You have referred to a statement by Mr. Warfield in regard to the foreclosure proceedings. When you expressed surprise that they were going on with the foreclosure, please state your conversation with Mr. Warfield at the time.

33 (Objected to, as it does not appear that declarations by Mr. Warfield should bind the company.)

A. When we delivered the quitclaim deed after the time they foreclosed, I went to the office and saw Mr. Warfield. I asked him, What is that foreclosure for? He said I need not be afraid, it was all the same thing; it is for the better thing; it is better for us. He

said, You can go and see Mr. Kendall. Mr. Kendall told me that he thought there were some judgments against the lots, and to make it safer he said they had to do it, foreclose it, it would be better for us when through with the process for a foreclosure, and that we should have the deeds after that.

(Answer objected to as stating a conversation that it does not appear the company should be bound by.)

Q. Did he say anything about that affecting your contract?

A. He said, That is all the same, the better; they had to go through the foreclosure, would be so much better—

Q. Better for what?

A. On account of the property, be better title.

Q. State who told you.

A. First I went to Mr. Warfield when I saw about the foreclosure. I asked Mr. Warfield what he was doing that for; our quitclaim having been given, we expected our deed when the contract was made. He says, Well, this is all for the better. You see Mr. Kendall, and he will tell you distinctly why they did it. I went to Mr. Kendall, and he said he thought there were some judgments against the property, and to find this out and to make it better for us they did it, and I think they found nothing against it, and Mr. Kendall said it was better to make the foreclosure and find out whether there was a judgment against the property, and it would not at all affect the contract, and be all the same, but only be better for the property.

(Answer objected to as incompetent and as giving declarations that it does not appear the company authorized any one to make.)

Q. Had you authority from your wife to settle this matter?

A. Yes, sir.

Q. And in all that you did in that matter you acted as her agent?

A. Yes, sir.

Q. What was the reason you gave your quitclaim deed?

Objected to as incompetent.

A. I wanted to make a settlement, and on that consideration I gave them a quitclaim deed to have the two lots, the homestead back, which was done.

Q. You gave the quitclaim?

A. Yes, sir.

Q. After the foreclosure proceeding did they or did they ever give you back your homestead as they agreed to?

34 A. No, sir.

Q. How was it with reference to your ability and readiness to do your part of the contract?

A. I was ready whenever there was a delivery on our contract, any time.

Q. You were always ready to comply with your part, were you?

A. Yes, sir.

Q. Did the company, by its officers and agents, come to you and solicit the quitclaim?

Objected to as indefinite.

A. Yes, sir.

Q. Who came to you to solicit it?

A. Mr. Warfield.

Q. Was that contract the only consideration for the quitclaim deed you gave?

A. The contract that we wanted those two lots back—the home-
stead.

Q. Was that all the consideration?

A. That was the consideration.

Q. Did they deliver back to you the quitclaim deed which you had given them?

A. No, sir.

Q. Is that quitclaim deed recorded?

A. Yes, sir.

Q. What reason, if you know, did the company assign for not complying with the contract?

Objected to as incompetent and indefinite.

A. They said they sent the deed to the main office and did not have it back yet.

Q. Who said that?

A. Mr. Warfield and Mr. Kendall.

Q. Afterwards was anything said by Mr. Warfield or Mr. Kendall with regard to having word from the home office to the effect that they wanted you to pay more money down or anything of that kind? If so, state what was said.

Objected to as leading and incompetent.

A. Mr. Kendall said that he had answer that they wanted more money. I answered him that I stuck to my contract that I had made, and upon delivery of the deed I am ready.

Q. Upon the delivery of the deed you were ready?

A. Yes, sir.

Q. Ready to comply with your part of the contract?

A. Yes, sir.

Q. Did Mr. Warfield state anything about that same matter?

A. He said the same—that it would be all right; that I would have the right to the same contract.

Q. What, if anything, did you say to Mr. Kendall or Mr.
35 Warfield when they told you that the company wanted a
larger sum down?

A. I told them that I stuck to that contract—the contract that I had made with Mr. Warfield and Mr. Kendall—and I have never done any business with anybody except with the agents here, and I thought the same as with the men down there, and I said, We have made our contract and we will stick to that; but they never

showed that deed to me. I told them I was ready at any time upon delivery of the deed to pay the \$1,000.

Objected to as irresponsible and incompetent.

Q. That is, when they would deliver up the deed?

A. Yes, sir.

Q. You were ready to deliver up your mortgage and pay your \$1,000 down? Have you been ready ever since to comply with your part of that contract?

A. Yes, sir.

Q. What have you done since that time towards urging the company to comply with the contract?

A. As I could not get my papers, I stopped them last year, the 12th of June—to stop them from delivering the property to other parties.

Q. You brought this suit, you mean?

A. Yes, sir.

Q. Did the company, before you brought the suit, through its officers here, know that you were ready to comply?

A. Oh, I told them.

Q. How often?

A. Oh, very often; Mr. Warfield and Mr. Kendall.

Q. When did the company get its deed of the property from the master, if you know?

A. On the 21st of January, 1882.

Q. Where was the foreclosure suit brought, in what court?

A. In the United States court here.

Adjourned to Friday, April 20th, 1883, at 2 p. m.

JULIUS KIRCHOFF.

MAY 2ND, 1883.

Cross-examination by Mr. GROSSCUP:

Q. What relation is Mrs. Diversey to your wife?

A. She is my wife's mother.

Q. How many children had she—brothers and sisters of your wife?

A. I don't know how many children there were; there are four living.

Q. How many were there living in 1871, when this money was borrowed?

A. Four.

Q. She owned a part of this land that was mortgaged?

A. Yes, sir.

36 Q. And your wife owned a part of the land that was mortgaged?

A. The land we mortgaged was our own and she joined with us.

Q. On her land?

A. Yes, sir.

Q. In order to make the security better?

A. The security was over \$100,000 alone, and her security was extra.

Q. You gave only one trust deed at the time the loan was obtained?

A. Yes, sir.

Q. And that trust deed covered her property as well as your property?

A. Well, I don't know anything about that. I know we gave a trust deed.

Q. Didn't she join in the same trust deed?

A. We gave a trust deed to L. D. Boone.

Q. And didn't your mother-in-law join in that trust deed?

A. Yes, sir; with her property.

Q. So that the one trust deed covered the property that she gave and the property that you gave?

A. I think so.

Q. Now, she had some property that was not covered by that trust deed?

A. I don't know anything about hers.

Q. You had some property that was not covered by the trust deed?

A. No, sir; we gave everything that we had. I think my mother-in-law put all her property in, but I don't know; I never inquired.

Q. When this property was bid off by the company, this homestead property was bid off at \$17,000, was it not?

A. So I understood.

Q. Was that as much as it was worth, in your judgment?

A. I don't know.

Q. You claim to have had an agreement from the company to get it back at \$10,000?

A. Yes, sir.

Q. Was \$10,000 as much as it was worth?

A. I don't know; I never inquired about the price.

Q. You knew nothing about the value of the property?

A. I don't know what it was worth.

Q. You had no judgment as to its value?

A. I had a judgment that it was worth \$10,000.

Q. When it was sold?

A. I never knew anything about it when it was sold.

Q. It was sold in 1880. Was it worth as much as \$17,000 at that time?

A. I don't know.

Q. Don't you know what its value was then?

A. I don't know.

Q. Can you put any estimate on it?

37 A. I never did. I made my bargain for the price I have said and never inquired any more after it.

Q. So you can't tell how much it was worth at that time?

A. I don't know; I never inquired.

Q. Do you know anything about the values of real estate at all in the city?

A. I never trouble myself about it.

Q. You have dealt in real estate—bought and sold?

A. I have.

Q. Do you — anything about their values in 1880?

A. I have not inquired about it.

Q. Do you know anything about present values of your own knowledge?

A. No; the bargain I made was in 1879.

Q. I am not speaking of the bargain. I am speaking of the value of real estate.

A. I don't know anything about the value of real estate. I have heard that property has gone a little higher, but I never bother myself about it.

Q. You think it is higher?

A. I think so; it ought to be.

Q. Is this property worth more than \$10,000 now?

A. I think it is; I should not wonder if it is.

Q. Is it worth \$15,000?

A. Perhaps more than that, but I don't know.

Q. In 1879 real estate was not worth so much?

A. No.

Q. It was not worth so much in 1880 as it is now?

A. No; it was not.

Q. All these contracts that you claimed were made were made with Mr. Kendall and Mr. Warfield?

A. Yes, sir.

Q. You made them yourself?

A. Yes, sir; I did.

Q. Your wife didn't negotiate at all?

A. I always made the bargain myself. My wife never did any business with them. I did it.

Q. And nobody else did any business in connection with the homestead but yourself?

A. No, sir.

Q. When did you say that you executed the quitclaim deed to the company?

A. On the 4th of September, 1879.

Q. Was that to close up your deal with the company?

A. Oh, no.

Q. What else were they to do?

A. I only agreed to give the quitclaim deed. It had been talked about from 1878, all the time. I gave the quitclaim deed on this arrangement only to get the homestead back.

Q. Was the company to go on and sell the rest of the land?

A. There never was anything said about that.

38 Q. Were they to go on and foreclose the rest of the land?

A. Nothing was said about that.

Q. You expected them to foreclose the balance of the property?

A. Oh, the quitclaim deed was made that they give me my homestead back.

Q. You gave the quitclaim deed of all your real estate?

A. Yes, except the two lots, whatever they would be appraised at.

Q. The quitclaim deed covered those?

A. We gave them a quitclaim deed on the whole of the property except whatever they would be appraised at, and we take the homestead back.

Q. Were the other lots appraised?

A. Yes, sir; everything.

Q. The homestead lots and all the other lots were appraised?

Plaintiffs objects to any inquiries of the contents of the appraisement, as it appears that the defendant company has possession of the appraisement inquired about, which is in writing.

A. Yes, sir.

Q. You knew that they would have to proceed to foreclose the balance?

A. Yes, sir.

Q. After you first talked about it you found out that they would have to foreclose, didn't you?

A. I found out afterwards that they did foreclose.

Q. Didn't you find out that they would have to foreclose?

A. I never knew anything about it when I made my contract with them.

Q. They filed a bill to foreclose, didn't they?

A. They filed a bill in 1878.

Q. To foreclose?

A. I don't know.

Q. Wasn't it to foreclose those mortgages in 1878?

Objected to, as it is not shown that there were any mortgages.

A. They filed a bill, but I don't know whether it was to foreclose.

Q. Did you never look to see what that bill was for?

A. I don't know; I don't remember.

Q. Did you inquire?

A. No, sir.

Q. Do you swear that you don't know what that bill was filed for?

A. Yes, sir.

Q. You were served with process?

A. I think I was.

Q. And your wife was?

A. Rather me; my wife never was served.

Q. You knew that there was a bill pending against you after you got that notice?

39 A. I may have. I don't remember—

Q. You knew what that notice meant?

A. No, sir; I did not.

Q. Didn't you know that that notice meant for you to go to court?

A. I think it was.

Q. Do you mean to say that you never inquired what the proceedings was against you?

A. No, sir.

Q. Did you ever inquire?

A. I don't think I ever did.

Q. You don't know what that bill was for?

A. I don't remember exactly.

Q. Didn't you know it was to foreclose these trust deeds?

Objected to, as it is not shown that there was more than one trust deed.

A. I don't know; we had a good many transactions.

Q. You didn't inquire?

A. I may and I may not. I don't know.

Q. There was another bill filed afterwards, was there not?

A. I don't know.

Q. You were served with a process afterwards—a notice that there was some other bill filed against you in 1880?

Objected to as not the best evidence.

A. What bill do you mean?

Q. Didn't you receive a notice from the marshal of the United States, or one of his deputies, that there was another bill filed against you in 1880?

Objected to, as it does not appear what suit counsel is inquiring about, who were complainants, what was the scope of the bill, what it related to, who were parties to it, and it is altogether indefinite, uncertain, and misleading.

A. I don't remember.

Q. Didn't you know that the Union Mutual Insurance Company was going on to foreclose in 1880?

A. Yes; I remember they sold the property in October, 1880.

Q. Didn't you know that before that they were going on to foreclose?

A. I don't remember.

Q. Didn't you inquire at that time?

A. No, sir.

Q. Did you pay no attention to the proceedings at that time?

A. I never knew anything of them.

Q. Do you mean to tell me that between July, 1878, and October, 1880, you didn't know that the Union Mutual Insurance Company was proceeding to foreclose against you?

A. They filed the bill in July, 1878.

Q. But you say you don't know what that bill was for?

40 A. No, sir; I knew they had a bill against us, but I didn't know anything about it.

Q. You didn't know that they were asking for an order to sell?

A. I understood they did; that they wanted to sell.

Q. When did you understand that?

A. Some time before that, but I don't remember.

Q. Didn't you have any conversations with anybody about that foreclosure?

A. After we gave a quitclaim deed, September 14th, 1879, I found out that they did want to foreclose. I went up to their office and asked Mr. Warfield what they meant—that foreclosure—as we had made a bargain about our property; he says, "It is all right; go to Mr. Kendall and he will tell you everything about it." We had made our contract before that we take that property at whatever the appraisal was at that time and take it at ten years' payment, \$1,000 each year. They were to have the deeds ready; they said they would send the deed to the main office, and upon delivery of the deed I pay them \$1,000 and \$1,000 each year for ten years.

Q. But that conversation was in September. Didn't you know they were proceeding to foreclose?

A. I went to the office on that account and they said it would be better for me to have the company foreclose. I went there and asked them. Our contract was made before by appraisal, that we take that property for \$10,000 at ten years' time, and after I found out that they wanted to foreclose the property I went to Mr. Warfield and asked him why they wanted to make so much trouble about that homestead. He said, "It is so much better for you. We found out there are some judgments against you, and to make it better we are going to have this foreclosed."

Q. That was in September, 1879?

A. Yes; 1879 or 1880.

Q. Was it September, 1879 or 1880?

A. September 14th I gave the quitclaim deed. This conversation was in 1879 or 1880.

Q. You don't recollect the date?

A. During 1879 or 1880.

Q. You can't come any more definitely than that?

A. I think I could come to 1880.

Q. This conversation that you have just related was in 1880?

A. Yes, sir.

Q. Then you knew that they were going to foreclose the balance of your property?

A. That is the reason I went to inquire.

Q. You expected to get this homestead back in your own name?

A. That was our contract. To get the homestead on that condition only I gave the quitclaim deed with my wife.

Q. And after that you understood that they were going to foreclose the balance of the property?

A. They foreclosed everything.

41 Q. Now, suppose they had foreclosed the balance of the property and it didn't meet the debt, what was to be done?

A. What debt?

Q. The amount of the debt.

A. The idea was to give them the quitclaim deed, and whatever the appraisal would be we would take our property at that price and ten years' payment.

Q. There was a debt against you of some \$60,000. Was that debt to be cancelled?

A. They figured up their amount, whatever they had against us, and whatever the appraisal was of the homestead would have been left for us to pay off, and that would settle with the company.

Q. That debt was to be cancelled?

A. Certainly.

Q. They were to have no further debt against you?

A. Yes; they were to take mortgage from us for the homestead.

Q. No other debt against you?

A. Never owed them anything.

Q. They were to cancel all the indebtedness against you except the mortgage you were to give on the homestead?

A. Certainly we were to give them the mortgage on the homestead.

Q. And they were to cancel all the rest of the debt?

A. We made our bargain.

Q. You didn't intend to take that homestead in your own name and then let them go on and foreclose the balance of the property as against these lienholders, and if the property didn't sell for enough to pay the balance of the lien that they could get a deficiency judgment against you and come on the homestead?

A. We made the arrangement with the company so that the company knew exactly the price. They had plenty of security all the time and they would get it all, too, as I understand it.

Q. They were not to sell the property and take any deficiency judgment against you?

A. No judgment against us. I never made that bargain. I never made any bargain of that kind.

Q. You understood that they were to do that?

A. Never talked about that.

Q. You were to turn over property and they were to cancel their debt and give you back the quitclaim deed to the homestead?

A. No; give them the quitclaim deed and we were to buy that homestead for the \$10,000 and pay a \$1,000 a year for ten years.

Q. With whom did the first conversation occur about your getting back your homestead?

A. Mr. Warfield.

Q. When?

A. In 1878, I think.

Q. Do you remember where it was?

A. I think it was at their office.

Q. Do you know who was present?

42 A. No, sir.

Q. Was the agreement made then?

A. No; we made the agreement afterwards.

Q. When was the next conversation?

A. We talked several times.

Q. When did you make the agreement?

A. That was in 1879.

Q. What time in 1879?

A. I don't know exactly; I can't remember. Either 1878 or 1879.

Q. Where was the appraisal made?

A. Right down in front of the property.

Q. Who was present?

A. Mr. Kendall and Mr. Rees, Mr. Warfield and I, we first appraised the property.

Q. That was the time you made the bargain that you were to get back the homestead, was it?

A. Several times we made the bargain; that was the time we appraised the property.

Q. When did you make the bargain to get back the homestead?

A. I think it was 1878 or 1879.

Q. Where were you when you made that bargain?

A. I can't remember exactly where we were.

Q. Were you in a house?

A. I shouldn't wonder; I was in their office.

Q. Do you know who was present?

A. I don't know.

Q. Was Mr. Kendall there?

A. I don't remember.

Q. Was Mr. Warfield there?

A. Yes.

Q. Who else was present?

A. There were frequently parties; I don't remember.

Q. And you can't say whether it was in the office?

A. I think it was in the office.

Q. Who was present?

A. There were several parties present.

Q. Do you remember their names?

A. No, sir.

Q. Did you know them at the time?

A. I don't know.

Q. You don't recollect?

A. I don't know who was there; I didn't inquire who was the next man behind the desk.

Q. Do you recollect what time of the day it was?

A. I don't know.

Q. Was it in the forenoon or the afternoon?

A. I don't remember that.

Q. Do you recollect whether they talked about anything else than this bargain?

A. I do not.

43 Q. Do you recollect what you first said to Mr. Warfield?

A. I don't remember what I said first or what he said

first.

Q. Do you remember what either of you said second?

A. I don't know.

Q. Do you remember any of the conversations?

A. What do you mean?

Q. This time when you made the agreement.

A. We made our agreement that we should have the property appraised.

Q. I am asking if you remember any of the conversation.

A. We talked about the property—about appraising it.

Q. Did you speak about that first?

A. I don't remember whether I spoke first or Mr. Warfield did.

Q. Do you recollect what you said to him?

A. I remember that I said to him that I didn't see why they wanted to make trouble by that foreclosure.

Q. Don't you know what you said first that day?

A. I don't remember.

Q. Do you remember what was said the day the agreement was made?

A. He said, We will send the deed up to the main office and have it come back.

Q. Is that all that he said?

A. He said, after the appraisal, they would send the deed up to the office and come back and pay the money.

Q. Was that all that was said that day?

A. A good deal was said, but I don't remember every word.

Q. That was the date the contract was first made?

A. We talked several times about that.

Q. But this was the first time that you talked that I am inquiring of?

A. We talked several times about that contract; we agreed on the contract.

Q. Do you remember the first time you talked about it?

A. I don't remember the first time.

Q. Do you remember the first, second, third, or fourth time that you talked about it?

A. I don't remember the first time. I remember that we made that contract.

Q. Do you remember where you were?

A. I think it was in their office.

Q. Do you remember what was said the day you made it?

A. I don't remember every word of it; no, sir.

Q. Do you remember what he said?

A. I know so much that we agreed on that contract.

Q. But you don't remember what was said?

A. I remember that he said that that contract should be fulfilled.

Q. Do you recollect the conversation on any particular day?

A. For several days we had spoken of the same thing.

- 44 Q. Do you remember any single conversation when you talked about that contract?

A. I do not know, sir.

Q. On none on these occasions do you remember who was present?

A. There were several parties in the office; some of the clerks, I think. It was not my business with the clerks. I did the business all the time with the agent.

Q. You don't remember a single date?

A. I never took anything down about them.

Q. You don't remember whether these conversations occurred in the office or out of doors?

A. It was in the office; yes.

Q. You don't remember what time of day it was?

A. During the day.

Q. Forenoon or afternoon?

A. Oh, during the day.

Q. You don't remember the particular conversation on any one of these occasions; you can't repeat a single conversation in which that contract was made?

A. The contract was made, as I said before.

Q. But you can't repeat a single conversation you had with Mr. Warfield or Mr. Kendall, can you?

A. I know that I made the contract with Mr. Warfield.

Q. Can you repeat a single conversation that you had with Mr. Warfield or Mr. Kendall?

A. Do you mean by the date?

Q. No; by the words—by what you said and by what he said.

A. I know that we made our contract, that we take it at that appraisal.

Q. Can you go on and say what he said and say what you said in a single conversation on any of these occasions?

A. Yes; that we take it at that price, what the appraisal was, and that it was \$1,000 a year for ten years, and Mr. Warfield said the company would make out the deed and send it to the main office to have it executed, and upon delivering the deed we pay them the \$1,000.

Q. Is that all you can recollect of all those conversations?

A. There was a good deal besides, but that is what I remember as the main thing.

Q. Can you recollect now anything else between you and Mr. Warfield and you and Mr. Kendall as to what you have repeated?

A. There was a good deal said, but I can't remember much.

Q. You can't remember it?

A. Not everything.

Q. And you can't remember on what occasions these things were said?

A. It was made between us at their office.

Q. There was a judgment against your mother-in-law, Mrs. Diversey?

45 A. I don't know.

Q. Wasn't there a judgment against her?

A. I don't know.

Q. Don't you know that the company got a judgment against her?

A. No, sir.

Q. You never heard of that?

A. No, sir.

Q. Never heard of that since?

A. No, sir.

Q. Did Mrs. Diversey make a quitclaim deed?

A. I don't know.

Q. Didn't she make a quitclaim deed at the same time you did?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. You don't know anything about her negotiations with the company?

A. No, sir.

Q. Although she was on the same debt with you?

A. No, sir.

Q. Never inquired of anybody?

A. No, sir.

Q. Never inquired of Kendall or Warfield?

A. No, sir.

Q. Paid no attention to her negotiations with the company?

A. I didn't know anything about it.

Q. Didn't care whether she got out of that loan or not?

A. I did care, but I didn't know.

Q. Did you get all the money of the loan?

A. Yes.

Q. She simply went on to secure you?

A. We had plenty of property; we had a \$100,000 besides her property.

Q. But she was not getting any portion of the money; she went in because the company wanted more security than your property?

A. I know she went in.

Q. And although she went in to the extent of some \$60,000 to \$90,000, you didn't know anything about her negotiations with the company?

A. Never knew anything about her settling anything at all.

Q. And you never inquired of her?

A. No, sir.

Q. How close together were you living?

A. In the same house.

Q. And you never had a conversation with her about it?

A. No, sir.

Q. This thing was running on over a period of two years, wasn't it, while you were trying to get this settlement?

Objected to as not being shown that this witness ever tried to get settlement.

46 A. I never tried to settle it.

Q. Who tried to settle it?

A. They came to me; the company offered me to give the quitclaim deed and they give us the homestead.

Q. During that time from the time the first bill was filed in 1878 up to 1880, when the property was sold, you never had any conversation with Mrs. Diversey?

A. No, sir; not about this.

Q. You never asked how she was getting out of this loan for which she was security for you?

A. Never asked her; never bothered myself about it.

Q. During all that time she ate at the same table with you?

A. Yes, sir; during part of 1879.

Q. And lived in the same family?

A. Yes, sir. I gave them over double the amount of the property in value besides Mrs. Diversey's property; we gave double the amount of the property for the loan that we had received from the company at that time.

Q. About the only thing you do recollect of this loan from 1878 up to 1880 was the fact of the making this contract by which you were to get your homestead back?

A. Made that contract in that way to give them the quitclaim deed. I recollect when we took the money.

Q. You don't recollect any other conversation?

A. We never had any other conversation except sometimes when I gave them money.

Q. Did you ever have to remind Mr. Warfield or Mr. Kendall what the contract was?

A. No, sir.

Q. Did you never call on them to tell them what you understood the contract to be?

A. No, sir.

Q. Did you never after September, 1879, tell them that you were to get the quitclaim deed from the company—that you understood the contract that way?

A. I gave them a quitclaim deed.

Q. After that?

A. Never told them anything about it except my contract, which was talked about between us.

Q. You knew that there were liens on the property besides the Union Mutual lien?

A. That is what I understood. I went to Mr. Warfield; Mr. Warfield sent me to Mr. Kendall, and he said that there were some judgments against it and they wanted to settle them up, and it would be better for me to get that all in order to settle them up.

Q. Didn't you know that there were some liens on the land before that?

A. I paid them all up.

Q. There were no other liens?

A. They told me there were.

47 Q. Did you pay them before you executed your quitclaim deed?

A. Oh, yes; they inquired about that and found out that they were all paid.

Q. When did you pay them up?

A. I don't know; I paid them through the court, and Mr. Kendall found out that they were all paid; they thought they had a judgment of Runyan's against us and they wanted to find out to

make the property in a better shape and give the company a better mortgage to clear that up.

Q. Didn't you know that there were some judgments against you except that Runyan's judgment?

A. When?

Q. Back in 1877, 1878, and 1879, against your property and your wife's property and your mother-in-law's property.

A. Do you mean my business?

Q. I mean on your land and your wife's land—the land that was covered by this trust deed.

A. I don't remember that.

Q. Didn't they have to make a number of people parties defendant to that first bill?

A. Yes, sir.

Q. Well, those were judgment creditors, were they not?

A. They were all settled.

Q. Did you represent so to the company?

A. The company found out themselves it was settled.

Q. Did you tell Kendall they were settled?

A. No, sir; Kendall told me. I knew it.

Q. Do you remember when you first told them they were all settled?

A. I don't remember that.

Q. So that at the time this agreement that you claim was made Mr. Kendall and Mr. Warfield and you thought that all that would be necessary to give the company a clear deed to the land would be the quitclaim deed from you and your wife?

A. Except to get our homestead.

Q. That by giving a quitclaim deed from you and your wife they would get a clear deed for the land?

A. Yes; except that we were to have our homestead back.

Q. At the time that you made the quitclaim deed you supposed your land was all clear from other liens; that there were no judgments or mortgages on it except the Union Mutual's?

A. Yes, sir.

Q. And you told that to Kendall and Warfield?

A. I never told them anything. They all knew it.

Q. You talked with them about that matter?

A. Oh, yes.

Q. And you all agreed to that?

A. Yes, sir.

Q. It turned out afterwards that that was not so?

A. They said so; I don't know. The judgments which were against me had been paid off at that time.

48 Q. Do you know what was due on the debt at that time when you talked with Warfield?

A. No, sir; I don't.

Q. Could you give us within \$10,000 of what was due?

A. No, sir; I couldn't.

Q. You didn't know?

A. No, sir.

- Q. You didn't know what the value of your land was, either ?
 A. Except what it was appraised at.
 Q. How many times did the company appraise it ?
 A. So far as I know, once.
 Q. That is the time that you went with Rees ?
 A. Yes, sir.
 Q. Do you recollect when that was ?
 A. I think it was either in 1879 or 1878.
 Q. Was it before or after you made the quitclaim deed ?
 A. It was before.
 Q. Did Warfield pay you for taking them out that time ?
 A. I paid that.
 Q. Didn't you get the money back ?
 A. No, sir.
 Q. How much did you pay ?
 A. I don't know ; I paid for the carriage.
 Q. You never got it back ?
 A. No ; never a cent.
 Q. Is that all the land they appraised that day ?
 A. Oh, no ; they appraised everything. I was with them when they appraised everything that was covered by the mortgage.
 Q. Did they appraise Mrs. Diversey's land ?
 A. I don't know ; we were not out there that day. We were at our property that was in the mortgage.
 Q. Did you have any conversation with them before you went out to appraise the land that day ?
 A. No.
 Q. Did you know how much — appraised it at—the whole tract ?
 A. I don't know ; Mr. Rees put the paper in there, he said.
 Q. Do you recollect how much it all amounted to ?
 A. I don't know ; I never asked about that.

MAY 5TH.

Cross-examination of JULIUS KIRCHOFF continued :

- Q. There was a piece of 135 acres included in the trust deed ?
 A. I think so.
 Q. To whom did that belong ?
 A. Mrs. Diversey.
 Q. There were lots 4, 5, 6, 7, 8, and 9, in block 4, in Kenogy's subdivision. To whom did they belong ?
 A. To me.
 Q. Do you know what they were valued at ?
 A. I don't know exactly.
 Q. Are they improved lots ?
 A. No, sir.

49 Above questions objected to on the ground that they seek to show the contents of the trust deed and therefore not the best evidence.

Q. What were those lots worth in 1878—lots 4, 5, 6, 7, 8, and 9, that we described ?

A. I don't know exactly.

Q. Those were not very valuable lots, where they?

A. Yes; they were worth a good deal of money.

Q. They had no improvements on them?

A. No, sir; only full of trees.

Q. There were also twenty-six and 50, in Sheffield's division. What were those worth?

A. I don't remember where Sheffield's division is.

Q. And you don't know what the value of those lots is?

A. No, sir.

Q. Do you recollect the date of the Rees appraisalment?

A. I do not.

Q. Do you remember what year it was?

A. 1879.

Q. Wasn't it 1878?

A. It was 1879; it may have been after November, 1878; it was in the spring of 1879, I think.

Q. You took Mr. Rees, Mr. Warfield, and Mr. Kendall out only once?

A. Yes.

Q. You were not with them twice when they appraised?

A. I don't remember that very well; I don't remember but one time with Rees, I mean.

Q. Do you remember how much the other land was appraised by Rees at the time he appraised your homestead lots?

A. I think the $3\frac{1}{2}$ acres he appraised at \$9,000, the other piece at \$15,000, and a lot on Rose street, \$1,000, and a lot on Chicago avenue, I think, \$3,000—\$2,000 or \$3,000: I don't remember exactly.

Q. Not knowing the value of your lands at that time, you couldn't tell me what they were all worth?

A. Do you mean what the lots altogether were worth—the whole amount?

Q. Yes.

A. No, sir; I couldn't tell that.

Q. Do you know that Rees' appraisalment in 1878 put them, without the farm, at about \$40,000?

A. I don't know what he appraised them at that time.

Q. Did you know what the debt was at that time?

A. I didn't know exactly.

Q. When you gave that quitclaim deed to the company you didn't intend that any further debt should hang over you?

A. It was that no debt should be against me except what we gave the mortgage for; we gave the quitclaim deed on that agreement that no debts be against me from the company except the mortgage we gave on our homestead.

Q. Then it was understood at the time you gave the quitclaim deed, if I gather it right, that that debt against you should be all satisfied—you should give the quitclaim deed in satisfaction of that, and then that you should execute the mortgage on your homestead for \$10,000 and they give it to you back?

A. I should give the quitclaim deed and they give me back the homestead.

Q. And also to satisfy the debt?

A. Yes.

Q. And was it to be considered satisfied?

A. Yes; except the homestead, what we owed the company on the homestead, \$10,000.

Q. And it was put in the quitclaim deed that it was given in satisfaction of the indebtedness of Julius Kirchoff and Elizabeth Kirchoff on their trust deed against you?

Objected to as tending to show the contents of a written instrument.

A. I don't know anything about what was put in the quitclaim deed. Our agreement was we should give the quitclaim deed and get the homestead back at whatever it was appraised for.

Q. And that the debt should be satisfied?

A. Yes. It was to be nothing any more. That settled everything.

Q. If they hadn't agreed to satisfy the entire indebtedness you would not have given that quitclaim deed?

A. Well, we had been speaking so long about this agreement about the homestead that we came to that agreement that whatever the property would be appraised to take as the homestead and then be quit of the debt against us except the \$10,000.

Q. They were to give you back the homestead, you say, and also to cancel all their indebtedness against you; and if they had not agreed to cancel their indebtedness against you, you wouldn't have given this quitclaim deed, would you?

A. I don't know.

Q. You wouldn't have given the quitclaim deed if they had held the debt over you?

A. Our agreement was that it should be cancelled and we get the homestead back.

Q. If they had not agreed to cancel the debt you wouldn't have given the quitclaim deed?

A. Well, we had been talking so long about it—to give the quitclaim deed—I don't know whether we would have given it.

Q. Would you have given the quitclaim deed if they had held a judgment over you for the balance over and above what the property would sell for?

Objected to as being in effect the same question which has been propounded to the witness several times and fully answered.

A. Our agreement was that this appraisement by Mr. Rees would settle the whole thing, give the quitclaim deed, and no debt would be hanging above us.

51 Q. There were two things you wanted done. You wanted to get the debt cancelled so that it wouldn't hang over you, and you also wanted to get your homestead back.

A. That was the reason we gave the quitclaim deed. That was our agreement.

Q. You wanted both those things?

A. It was settled that way.

Q. And that was the reason you gave the quitclaim deed?

A. Yes, sir.

Q. To get both of those things done?

A. Yes, sir.

Q. It wouldn't have done you any good to get your homestead back unless you had your debt cancelled?

Objected to as argumentative and calling for conclusion and not facts.

A. That was our agreement I made with Mr. Warfield.

Q. To have both done—to have your homestead back and your debt cancelled?

A. Yes, sir.

Q. You didn't know what the land was worth and you didn't know what the debt amounted to and you were desirous of having the land pay the debt, weren't you?

A. Our agreement was whatever the property would be appraised for.

Q. Should be taken in full satisfaction of the debt?

A. The main thing when we had the property appraised was whatever the homestead was worth and to make the settlement with them to give the quitclaim deed and take the homestead back.

Q. And, whatever the property was worth, turn it over for the whole debt?

A. They made some arrangement about Mrs. Diversey's, but don't know what that was. She gave in some property, too.

Q. She gave a quitclaim deed, too?

A. I don't remember very well.

Q. None of these agreements that you speak of were put in writing?

A. No, sir.

Q. They were all merely verbal?

A. The same as I have always done with the company since 1871, when we took the money; did everything in the same way. I never put anything down because I expected we would never have any trouble with the company, and so we made the agreement with the officers in their office here.

Redirect examination.

By Mr. HARBERT:

Q. What is your nationality, Mr. Kirchoff?

A. German.

Q. Have you or not had some difficulty in understanding some of the questions which have been put to you?

52 A. I didn't understand some of them very correctly because I never went to school here to study the English language.

Q. When did you first begin talking with Mr. Warfield about this arrangement?

A. It was before they filed the bill—before the 11th of July, 1878.

Q. How long before you came to an agreement about it after you commenced talking about it?

Objected to as not being in rebuttal.

A. It was during 1878 and 1879 when we came to the agreement.

Q. Did you or not agree almost at once as to what you would do about the matter?

Objected to as leading and not in rebuttal.

A. Oh, yes.

Q. When you refer to a final agreement about the matter what do you mean?

A. I mean that we made our agreement for the homestead and should give a quitclaim deed and have the homestead back at whatever it would be appraised for.

Q. Was your agreement that you should have the homestead back for what it would be appraised at made before or after the appraisal?

A. After the appraisal; whatever the appraisal would be the price. Our agreement was made before that whatever we should pay that should be what the appraisal was.

Q. Then do you mean that you had no understanding with the company about the matter till after the appraisal?

A. No; before. We had an understanding from 1878, when they filed the first bill. We had spoken about the quitclaim deed, and then we made the agreement that whatever the price should be of the homestead that should be the appraisal. The bargain was made at ten years, only the price was set; that was the appraisal.

Q. The price was fixed by the appraisal?

A. Yes, sir.

Q. When did you make your first agreement?

A. In 1878, before they filed the first bill.

Q. How many times did you talk that agreement over with Mr. Warfield?

A. Oh, very often we spoke about it, but I don't know exactly how often.

Q. Was the agreement fully understood during all these conversations?

Objected to as incompetent and as having been gone over in chief.

A. Yes, sir.

Q. You say the agreement was made and fully understood before the appraisement?

53 Objected to.

A. Yes, sir.

Q. What are we to understand you as meaning when you say the final agreement was made after the appraisalment?

Objected to as not properly in rebuttal.

A. We often spoke about the agreement that they wanted to get the quitclaim deed of us, and we made an agreement to get our homestead back, and that they would have it appraised some time and I should go along, and whatever the price would be we would take at ten years' time, \$1,000 a year.

Q. Then you mean, do you, that before the appraisalment it was impossible for you to tell how much you would have to pay in dollars and cents for the homestead?

Objected to as leading and not properly in rebuttal.

A. We couldn't know it except as they appraised the property; whatever they appraised it.

Q. Was the contract in any way modified or changed after the appraisal?

A. It was all the same. We understood it all the time the same.

Q. And after the appraisal and by the appraisalment it was determined how much you were to give for the homestead?

A. Yes, sir.

Q. Please look at the paper which I now show you and state whether or not it is the appraisalment which you have testified about, if you know.

(Hands paper to witness, being a paper produced under notice by defendant's counsel.)

A. I never saw this one; I don't — anything about it.

Q. Please examine the instrument now shown you and state whether or not the same was signed by you and your wife.

(Hands same to witness.)

A. Yes, sir; that is my handwriting and that is my wife's writing (indicating).

Q. Is that the quitclaim deed to the company that you have testified about?

A. Yes, sir.

(Plaintiff introduces a copy of said deed by consent of defendant's counsel; also a copy of the endorsements thereon, which copies it is agreed shall have like force and effect as evidence that the originals thereof would have had, defendant reserving the right to object thereto for incompetency, marked Exhibit "B.")

Q. Who attended to Mrs. Diversey's business for her?

A. Adam J. Weckler, my brother-in-law.

54 Q. Did you ever attend to any business for Mrs. Diversey relating to this property?

A. No, sir.

Q. Did you during the foreclosure of the trust deed to Boone ever examine the bill which was drawn in that case?

A. No.

Q. Who prepared the quitclaim deed which you have referred to?

A. It was brought in by Mr. Warfield, I think, from their office.

Q. Do you know whether it was read over to you or whether you read it?

A. I don't remember very well.

Q. Do you remember where Mr. Rubens acknowledged it?

A. I don't remember; I think it was in our house.

Q. What is your impression with regard to whether the deed was made before the appraisement or the appraisement before the deed?

A. The appraisement was first.

Q. Then when you made your quitclaim deed you knew exactly how much you were to pay for your homestead?

A. Yes, sir.

Q. After the appraisement and after you made your quitclaim deed to the company, what, if anything, did Mr. Warfield tell you about having sent on a deed for the company to make back to you?

Objected to as incompetent.

A. He said he was going to send the papers to the main office and have them sent back, and that it would be ten years' payment at \$1,000 a year.

Q. In answer to a question on cross-examination, "When did you make the agreement?" you answer, "It was in 1879." Then follows the question, "What time in 1879?" and you answer, "I don't know exactly; can't remember; either 1878 or 1879." What do you understand by the word agreement in that question?

A. Our contract about the homestead. I mean the bargain we made for the homestead. Whatever the appraisal would be we get it back. We often talked about the bargain in 1879, and after the appraisal we finished the bargain at what the appraisal was.

Q. What do you mean by finished the bargain?

A. Made the agreement to get our deeds from the company.

Q. Do you mean that you finished it by determining how much you would have to pay?

A. That is what we made it—ten years' payment.

Q. Before that you had an agreement to take it at what the appraisal would be?

A. At whatever the appraisal would be, and then we made up the time at \$1,000 a year.

Q. And after the appraisement you learned how much it would be?

A. Yes.

55 Q. And the learning how much it would be finished the bargain?

A. That is what I mean.

Q. When did the company go back on its agreement?

A. After we made the agreement I saw Mr. Warfield, and he said that they would send the papers up to the main office, and on their return we get our deed and give them the mortgage; but he said there were some judgments on the land, and for me to see Mr. Kendall and he would know some more about it. I went up to Mr. Kendall in their office and asked him how it was that we had heard nothing about the papers from the main office, and he said they had found about some judgments on the property, and it would have to be settled and closed, and it would be better for us on account of the papers.

Q. By us whom do you mean?

A. Me—the judgment had to be settled up first.

Q. Do you mean judgments against you or against your wife or both?

A. Against both, I think.

Q. What next happened after your talk with Mr. Kendall?

A. He said they had got to clear them all up and look them all over, and that took considerable time.

Objected to as being a repetition of the examination-in-chief. It is agreed that this objection may extend to all former questions on redirect.

A. He told me they had to foreclose to make the property in better shape.

Q. Did he or not still express himself as intending substantially to comply with the contract?

Objected to as incompetent.

A. He said yes. I told them that I had made the contract and I would stick to it.

Q. What did they say to that?

A. Well, they said that they had made that contract with me and they had to fulfill it, and Mr. Warfield often said that we had made that bargain and it was all right.

Q. When did the company first, to your knowledge, refuse to comply with the contract or do anything inconsistent with it?

A. I don't remember exactly the year or the time.

Q. Was it about the time the company took proceedings to put you out of your house?

A. Yes; they came with a force of men and said they had the power to throw everything out of the house if we didn't go. I told them that I had a right to it with the bargain I had made before.

Objected to as incompetent.

Q. Did you employ an attorney in that proceeding for restitution in the United States court?

A. Yes.

56 Q. Was that a short time before the filing of the bill in this case?

A. Yes; before we filed the bill in this case.

Q. I believe you testified on direct examination that the company never did tender you a deed of the homestead lot?

A. They never did. I have often asked about it.

Q. You had put all your property in the trust deed, had you?

A. I had.

Q. So that a judgment against you would have been of no value to them, would it?

A. I put in everything except a farm which I sold in 1872 and the proceeds of which I paid over to the company, less expenses. In my former examination I forgot for the moment that that hadn't been put in.

Q. Then at the time you made this bargain with the company a judgment against you would have been of no value, would it?

A. Not much. Still I had a business all the time.

Q. Had you much invested in that?

A. Yes, sir.

Q. How much?

A. Over \$25,000.

Q. How many judgments did there appear to be against you at that time?

A. I don't remember.

Q. What were they for?

A. They only appeared to be judgments. As a matter of fact they had been disposed of. I think one was on account of a sister-in-law, Mrs. McMann. They never amounted to anything.

Q. Do you — when Mr. Warfield and Mr. Kendall left the employment of the company?

A. No.

Q. Did the company have good security for its debt?

A. Yes, sir.

Q. Did Mr. Warfield ever say anything about that?

A. He never spoke much about it. He was satisfied.

MAY 8, 1883—Continued from May 5th.

JULIUS KIRCHOFF, the witness, desires to correct his testimony in this: That where he answered the question as to what the other lands were appraised at by Rees at the time the homestead was appraised he thought reference was made to the amount it was sold for on the foreclosure and answered accordingly.

See page 36.

Redirect examination by Mr. HARBERT continued:

Q. Referring to your financial condition in 1877, '78, and '79, please state whether or not your business was incumbered during that period.

A. In 1877 I gave a mortgage on the business for \$6,600 to the Philip Best Brewing Company, and I had some judgments against me. I took that loan for two years in '79. I had, I think,
57 \$3,000 more. The first loan was on the bottling department; the last was on the business on Clark street.

Q. Had you given out any judgment notes at that time?

A. Well, I had some against me. There were judgment notes besides what I gave mortgages for, and they took notes with them, the same amounts, same dates, on the 31st of January, 1880. I cancelled all this and gave a new mortgage for \$16,000, and that covered all my business on Clark street, Monroe, and the bottling.

Q. In estimating what you were worth from 1877 to 1880 in your business did you include any stocks?

A. I had shares in several mining companies; I figured over \$20,000; then I had the papers against me.

Q. Then, in making the \$20,000, you figured in your mining stock?

A. Yes, sir.

Q. Were you closed up under this last mortgage?

A. Yes; they closed me up on the 7th of May, 1880, and took everything away then.

Q. What did the company or its agents or attorney know, if anything, about your business?

Objected to as incompetent and indefinite.

A. They often talked about it; they knew I had some mortgages on my place—on my business. We spoke sometimes about it—Mr. Warfield and I did.

Q. How long had you lived on the property which you call your homestead?

A. From 1865 or '6 until the fire, and I built it up again with the building which is on there now, and then lived there until put out by the marshal.

Q. When were you put out by the marshal?

A. The first of May, 1882.

Q. How long have you lived in Chicago?

A. 30 years.

Recross-examination.

By Mr. GROSSCUP:

Q. How many judgments were there against you in 1878 and 1879?

A. I don't know how many; there were several.

Q. How long had they stood against you?

A. Oh, for some time; some till I had some time to settle them.

Q. Were they ever discharged—paid off?

A. A good many, yes, sir; not all.

Q. These that were standing against you in 1878 and '79?

A. I think they were paid; some of them.

Q. When?

A. Some I settled in '79 and some I paid in '80.

Q. What did you mean by telling me on cross-examination, then, that there were no judgments against you?

58 A. Mr. Kendall said they had got to foreclose the property, and there were some judgments against me, but finding out he said there were none; that they were paid up.

Q. You told me the other day that there were no judgments against you?

A. Mr. Kendall told me they were all settled up; that they were against my business.

Q. The judgment-against your business would be against your land, wouldn't they?

A. Mr. Kendall told me he had to look that up whether they were paid.

Q. In answer to a question of Mr. Harbert's you say they only appeared to be judgments, but as a matter of fact that they had been disposed of; what did you mean by that?

Objected to as not giving the language of the question and answer.

A. I meant that when Kendall told me that the judgments were paid that Mr. Kendall said the judgments were paid—settled up.

Q. Was that before the foreclosure suit was begun, when those judgments were paid?

A. When we made the bargain the agreement was that they would send the papers to the main office. I found out that they wanted to foreclose the property, and I asked them what they were doing that for. Mr. Warfield said this had to be done; that I should go to Mr. Kendall, and I went to him and he said that there were some judgments against the property, and they had better find out whether that was so or not, and it would be better for me and the property, and then he found out that the judgments were, what he thought, all settled.

Q. Did you find that out before the foreclosure?

A. I think it was.

Q. And after he found that out he filed his supplemental bill to foreclose?

Objected to.

A. I don't know anything about that.

Q. You say that a deed was made out of the property from the company to you?

A. That was our contract.

Q. You said a deed was made out and sent to the company?

A. The papers should be made out at their office.

Q. Did you see the deed?

A. I don't remember.

Q. All that you remember, then, is the conversation with Mr. Warfield?

A. That I had made that contract with them to have no judgments hang against me, and also to have the homestead, and they told me they had sent the papers away to their main office.

59 By Mr. HARBERT:

Q. You have just been asked about some conversation with Mr. Kendall occurring before the foreclosure. What do you understand counsel to mean by "foreclosure"?

A. We gave our quitclaim deed and they appraised the property; that we should have the homestead back and no judgments hanging above us, and I heard that they were going to foreclose the property, and Mr. Kendall said that there were some judgments against us, and it had to be done, anyhow; it would be better for our property; give us the deed—and they give us our homestead back.

Q. Was there just before that any talk about stopping the foreclosure and taking the quitclaim deed from you?

A. They filed the bill on the 11th of July, 1878, and we had been talking all the time about this bargain to give them the quitclaim deed.

Q. Was that talk about the judgments before or after July, 1878?

A. After that; after they filed the bill against us.

Q. Then by the foreclosure you meant the going on and getting the decree, didn't you?

A. Yes; that we should have the same contract; that the company would fulfill the same contract with us.

Q. It was necessary for them to perfect the foreclosure?

A. That was what they said about that; it would not have any trouble with us on account of our agreement that we made with the company; it would not affect any contract at all with us.

Q. Then, when you said this conversation about the judgments was before the foreclosure did you mean it was before the bill or before the decree and sale?

A. I think it was 1879 we talked about the judgment.

JULIUS KIRCHOFF.

OCTOBER 19TH, 1883—2 p. m.

Parties met by agreement.

Present: Mr. Harbert, for complainant; Mr. Grosseup, for defendants.

EDWIN A. WARFIELD, a witness called on behalf of complainant, having been first duly sworn, was examined by Mr. Harbert, and testified as follows:

Direct examination.

By Mr. HARBERT:

Q. State your name, age, place of business, and occupation.

A. Edwin A. Warfield; I am of lawful age; reside in the village of Hyde Park, Cook county, Illinois; my occupation is that of a real-estate dealer.

Q. Are you acquainted with the parties to this suit, Elizabeth Kirchhoff and the Union Mutual Life Insurance Co. of Maine?

60 A. I am somewhat acquainted with Elizabeth Kirchhoff and with the Union Mutual Life Insurance Co. of Maine.

Q. Are you acquainted with Julius Kirchhoff, the husband of the complainant?

A. I am.

Q. Were you at one time in the employ of the Union Mutual

Life Insurance Co. of Maine; and, if so, when did such employment begin, how long did it continue, and what was the nature of such employment?

Defendant's counsel objects to the witness stating the nature of that employment until it appears that the appointment itself is not in writing.

A. I was in the employ of the Union Mutual Life Insurance Co. of Maine. I think the employment began in 1869 or 1870. As to the time that it continued is an unsettled question. The nature of the employment has been that of special agent, superintendent of agencies for the company, and financial agent in Chicago.

The latter part of the answer concerning the nature of the employment objected to.

Q. What was the nature of the business transacted by you on behalf of the company?

A. The nature of the business transacted by me on behalf of the company here in Chicago was that of financial agent in connection with loans and real estate.

Question and answer objected to for the same reason as the foregoing.

Q. How extensive were your duties as financial agent?

Objected to because it does not appear but that his appointment is in writing.

A. My duties here embrace the management of the company's loans and real estate.

Answer objected to for the same reason.

Q. Were you or not the sole financial agent of the company during the period you were acting for them as such in this State?

A. I was.

Q. Did your employment by the company continue till after '71?

A. It did.

Q. Do you remember of a loan being made by the company to Elizabeth Kirchoff, in which Mrs. Angelina Diversey was interested, for about the sum of \$60,000, about May 8th, 1871?

A. I do.

Q. Was there more than one loan of that amount or near that amount?

A. I think that there was but one loan for \$60,000.

61

Q. And no more?

A. There may have been loans previous to the one in '71.

Q. What was this loan which you have referred to in 1871 for about \$60,000 secured on?

A. There were several pieces of property given as security for this loan. There was a hundred and twenty acres, more or less, about half way between the stations of Wilmette and Winnetka, on the Chicago and Northwestern road, about 16 miles north of the city, being a part of the security for this loan. There were several

lots in Knokke and Gardiner's subdivision in Lake View; there were one or two lots in Rose's subdivision in Chicago and two lots near the corner of Rush and Pierson streets, in this city. There was a lot on Chicago avenue, near Rush street. I don't call to mind any other property just now.

Question and answer objected to as not being the best evidence on the subject.

Q. There was a lot on the corner of Rush and Pierson streets, was there not, and also another lot adjoining the same, these two lots being called by Mr. and Mrs. Kirchoff their homestead?

A. There was a lot on the southeast corner of Rush and Pierson streets, and there was a lot cornering on this one which has a frontage on Pine street, in the same block. The corner lot was occupied as the homestead of the Kirchoffs.

Q. The smaller lot was nearly in the rear of the other?

A. I think it corners on the other.

Q. Was this loan ever paid in cash by the Kirchoffs?

A. No, sir.

Q. Do you remember when they began to make default in interest or taxes?

A. I don't remember exactly; it was prior to September, 1876.

Q. Who represented Mrs. Kirchoff in the matter of the negotiation for and subsequent attention to this loan, if any one?

A. Her husband, Julius Kirchoff, so far as I had any connection with the matter.

Q. After defaults began to be made in the payment of interest, did you have any interview with Mr. or Mrs. Kirchoff in relation to the same?

A. I did with Mr. Kirchoff.

Q. How frequent were such interviews and when did they begin?

A. They began in the fall of '76 or early in the year 1877. There were times that I saw him frequently; sometimes perhaps a week or two, more or less, may have elapsed between our interviews.

Q. Who was the local attorney here of the company at that time?

A. Robert B. Kendall.

Q. Did he continue in the employ of the company till after '81?

62 A. It is my impression that he did. I cannot state when his connection with the company terminated.

Q. Please state the circumstances under which these interviews to which you have referred occurred, the causes which led to them, and give me in as nearly a chronological order as you can what occurred in each of these interviews—what was done and what was said.

Objected to because it does not appear that Mr. Warfield had any authority to act for the company in those transactions.

A. The circumstances, as I remember them, were that there had been a default in the payment of the interest and taxes on the Kirchoff loan, and the interviews were in regard to the possibilities

or the probabilities of their paying the interest or taxes or some portion of them. We had interviews in regard to funding the entire indebtedness into a new loan to draw four or five per cent. interest. Mr. De Witt, the president of the insurance Co., was present at one of these interviews and proposed to fund the entire indebtedness to the company into a new loan, provided they would pay their interest on the new loan at the reduced rate, and there was an interview, at which a proposition was made for the Kirchoffs to make and deliver a quitclaim deed to the Union Mutual Life Insurance Co. covering all the property embraced in the trust deed given to secure the loan, and that the insurance Co. would sell and reconvey to the Kirchoffs their homestead, which was the lot on the south-east corner of Rush and Pierson streets, and the proposition, I believe, embraced the lot which corners on the homestead and fronts on Pine street. This conveyance was to be made by the insurance Co. at the appraised value of the property, to be made by James H. Rees. The appraisal was made by Mr. Rees, which was to be the price that the Kirchoffs were to pay for the property. The terms, as I remember them now, were \$1,000 cash on the delivery of a deed from the company and \$1,000 a year until the property was paid for, together with interest at six per cent. on the deferred payments. Subsequently Mr. Kirchhoff came with a carriage and took Mr. Rees, Mr. Kendall, and myself to look at the property for the purpose of making the valuation. As near as I remember, the homestead was valued at \$7,500 and the lot fronting east on Pine street was valued at \$2,500, making \$10,000, which the Kirchoffs were to pay for the property in instalments of \$1,000 a year until paid, together with interest at the rate of six per cent., and this was to be the price for which the insurance Co. would reconvey the property to the Kirchoffs on the terms which I have stated.

Objected to as being irrelevant and incompetent and for the reason that it does not appear that he had any authority to make these arrangements.

Q. \$1,000 on the delivery of the deed from the company?

A. My understanding was that the \$1,000 was to be paid on the delivery of the deed from the insurance company to Kirchhoff, and then I should say \$500 every six months thereafter of the principal sum, together with the interest at six per cent.

Q. Did Kirchhoff make a quitclaim deed of all the property? And, if so, state what next occurred.

Objected to as calling for parole evidence of a written instrument.

A. Yes; he made a quitclaim deed of all the property embraced in the trust deed given to secure the loan to the insurance company, and the understanding was that the quitclaim deed would do away with the foreclosure proceedings—that is, Mr. Kendall would dismiss the proceedings if any had been commenced to foreclose the loan, but after the Kirchoffs' deed had been delivered and recorded Mr. Kendall found that there were certain objections to the title to the property which could be perfected by a foreclosure, and I notified

Mr. Kirchoff that the proceedings would go on in order to perfect the title to the property. I don't remember what Mr. Kendall's objections to the title were.

Answer objected to as incompetent and as not being the best evidence on the subject on which it treats.

Q. After it had been discovered that to perfect the title it was necessary to foreclose, what was the understanding then with Mr. Kirchoff, if the former understanding was in any way modified?

Objected to.

A. I stated to Mr. Kirchoff that the proceedings to foreclose would go on, and I referred him to Mr. Kendall for the particulars.

Q. What, if anything, was said by you at the time when you told him the proceedings would have to go on, with reference to the effect, if any, of such proceedings upon the agreement he had made with you about his receiving back his homestead property?

Objected to for reasons before assigned.

A. As I remember it now, I told Mr. Kirchoff that we would have the deed from the insurance Co. executed, and the mortgage back to the insurance Co. signed by him, and that the payments could be made to the company, and it is my impression the deed was prepared by Mr. Kendall and sent to the insurance Co. for execution.

Q. You say that Mr. Kirchoff was to receive his deed at that time. Do you mean that he was to receive his deed at the time when the title should be perfected in the company by the foreclosure?

A. In my negotiations I did not think it necessary to wait until the title was perfected in the insurance Co. by a foreclosure; I thought that he could take the deed from insurance Co. and give the mortgage back to the company.

Question and answer objected to.

Q. You say the deed was made out by Mr. Kendall and sent to the company, the deed from the company to the complainant?

A. Yes, sir.

64 Q. Was such deed ever returned, to your knowledge, or tendered to Mr. or Mrs. Kirchoff?

A. It was not, to my knowledge.

Q. Was there more than one quitclaim deed made by Kirchoff to the company?

A. I think there was only one quitclaim deed made by the Kirchoffs to the insurance Co.

Q. Do you remember a conversation between yourself and Mr. Kirchoff after the foreclosure was begun in which something was said about the foreclosure, but that it was all the same thing so far as he was concerned, or something to that effect?

Objected to as incompetent, leading, and for the reasons stated in the foregoing objections.

A. That was the conversation substantially at the time above referred to, in which I asked him to see Mr. Kendall for particulars.

Q. Please state that conversation as nearly as you can—what Mr. Kirchhoff said to you and what you said to him.

Objected to.

A. As near as I remember it now, I told Mr. Kirchhoff that Mr. Kendall said the title was not satisfactory to him under that quitclaim deed, and that he would go on with the foreclosure proceedings; and I asked Mr. Kirchhoff to go and see Mr. Kendall, as he could give him more particulars about it than I could, but I did not understand that it made any difference in the negotiations which were pending between us at that time.

Q. Please state whether or not the arrangements and agreements between the company and Mr. and Mrs. Kirchhoff had at that time been concluded.

Objected to.

A. The negotiations spread over a considerable time, and I cannot state definitely, but to the best of my recollection the agreement for his quitclaim deed and the reconveyance of the homestead property back to the Kirchoffs had substantially been made at that time.

Adjourned to Oct. 23rd at 2 p. m.

KIRCHOFF
v.
U. M. LIFE INS. CO. }

JUNE 7TH, 1884.

Parties met pursuant to notice, and adjourned without taking testimony to June 9th, 1884, at 2 o'clock p. m.

JUNE 9TH, 1884—2 o'clock p. m.

Parties met pursuant to adjournment. Mr. Herbert appeared on behalf of plaintiff and Mr. Grosscup on behalf of defendants.

65 Examination of EDWIN A. WARFIELD (continued).

Mr. HERBERT:

Q. Mr. Warfield, in your previous testimony you have narrated certain negotiations and transactions between yourself on behalf of the Union Mutual Life Insurance Company on the one part and Mrs. Kirchhoff, the complainant, on the other part. Please state whether or not you had authority from the defendant company to do and say what you did in that behalf.

Objected to by defendant's counsel unless it appears that the authority was not in writing.

A. I believe that I had authority to do all that I did do in the matter.

Q. Was this or not true with respect to conversations and declarations as well as act- done by you?

A. Yes, sir.

Q. From whom and in what manner was such authority derived?

A. From the officers of the Union Mutual Life Insurance Company of Maine either by letter or verbal instructions when the officers of the company were here in Chicago.

Q. To what officers do you refer?

A. The president, vice-president, or chairman of the finance committee of the company.

Cross-examination by Mr. GROSSCUP:

Q. When did your connection with the company begin?

A. I believe that I have stated that it commenced either in 1869 or 1870; I do not remember exactly the date.

Q. When did it terminate?

A. I have stated that that was an unsettled question.

Q. When did you cease to act as its agent?

A. That is an unsettled question.

Q. Is there no time that you can fix when you ceased to act as its agent?

A. I have fixed no time.

Q. You are not its agent now, are you?

A. No, sir.

Q. How long since is it that you have not been its agent?

A. I cannot state that exactly.

Q. Are you unable to state by reason of the inaccuracy of your memory or for any other reason?

A. For other reasons than from inaccuracy of my memory.

Q. Will you state what the nature of those reasons is?

A. No, sir.

Q. Can you state?

A. Yes, sir.

Q. Generally, was it due to a misunderstanding between you and the company?

A. Probably it was.

66 Q. Friendly relations did not exist between you and the company, then, when you ceased to act as its agent?

A. I cannot answer for the company.

Q. Can you for your own part?

A. Yes, sir.

Q. How was it as to yourself?

A. There were some matters that I did not exactly approve of.

Q. And your agency was terminated by reason of this disagreement between you and the company?

A. I do not so understand it.

Q. Was it not terminated because there was a disagreement between you and the company concerning certain matters?

A. I think there was an attempt made to terminate the agreement on account of such——

Q. An attempt made by which side?

A. The insurance company.

Q. Which attempt brought about unfriendly relations, did it not?

A. I cannot state for the insurance company whether their relations were friendly or unfriendly.

Q. Do you know where this complainant is now employed?

A. I was not aware that the complainant in this case was employed anywhere.

Q. Has he ever had any business relations with you?

Mr. HARBERT: The complainant is a woman.

Mr. GROSSCUP: I mean Mr. Kirchoff, the husband.

A. Mr. Julius Kirchoff, the husband of the complainant, has business relations with me at the present time.

Q. What is his business connection with you?

A. Whenever he sells a lot that I have charge of or represent I pay him a commission for so doing.

Q. He is in your employ for that purpose, then, is he?

A. No, sir; only as a broker. I pay him a commission the same as I would any other man in case he brought me a customer for a piece of property.

Q. Your appointment was in writing, was it not?

A. Yes, sir.

Q. That writing set out the nature of your appointment, did it not?

Objected to as incompetent.

A. Yes, sir.

Q. Have you a copy of that writing in your possession?

A. I believe that I have.

Q. Where is it—at your office?

A. Yes, sir; I think it is.

Q. Under that appointment you corresponded with the company concerning what you did and what you were instructed to do as their agent here, did you not?

A. Yes, sir.

67 Q. What office did Mr. Kendall hold in the company?

A. Mr. R. B. Kendall was the attorney for the company here in Chicago.

Q. Did you report to the company everything that you did in this transaction between Mr. Kirchoff and the company?

A. I do not know that I did, but I presume I did.

Q. Was it not your habit to report everything that you did to the company?

A. It was my custom to report everything.

Q. Was it not required of you?

A. No; not absolutely.

Q. Upon reporting to the company what you did and upon receiving their instructions, did you always follow their instructions?

A. Yes, sir.

Q. Did you in this case always follow their instructions?

A. I believe that I did.

Q. Did you make any agreement with Mr. and Mrs. Kirchhoff or anybody acting for them that was contrary to the instructions you received from the company?

A. No, sir; I do not believe that I did.

Q. Did you make any agreements with them in this transaction that were not first reported to the company?

A. No, sir; I do not think that I did.

Q. Your correspondence, then, with the company and their correspondence with you would be a correct record of the transactions that you had with Mr. Kirchhoff?

A. My correspondence with the company and their correspondence with me would be a correct record of my transactions with Mr. and Mrs. Kirchhoff so far as anything in the matter was done by correspondence.

Q. You did not in your correspondence with the company mislead them as to what you were doing?

A. No, sir.

Q. Or attempt to mislead them as to what you were doing?

A. No, sir.

Q. If you stated to them in your correspondence that these negotiations were merely pending negotiations and were not consummated agreements, that was the real state of affairs at the time of such correspondence?

Objected to as attempting to obtain from the witness a legal conclusion and is incompetent.

A. Whatever I stated to them in my letters to the company were the facts in the case at the time such statements were made.

Q. Did you have interviews with Mr. Kendall during the time that the Kirchhoff foreclosure was going on?

A. I did.

Q. Did you report to Mr. Kendall and did he report to you what was being done by each of you respectively with Mr. Kirchhoff?

68 A. No; I do not think that we did, except in a general way.

Q. You acted jointly in the matter, however, did you not?

A. Yes, sir; in so far as we acted together.

Q. You did not attempt to mislead Mr. Kendall?

A. No, sir.

Q. Nor to conceal from him what you were engaged in?

A. No, sir.

Q. But whatever you stated to Mr. Kendall that you were engaged in was the truth at the time?

A. Whatever I stated to Mr. Kendall, either by letter or word, were the facts at the time those statements were made so far as my connection with the matter was concerned.

Q. You do not seem in your examination-in-chief to remember dates very accurately. Is that by reason of the fact that those dates are so far removed from this time?

Objected to as assuming as a fact that which is unproven, and because it does not call to the attention of the witness the testimony referred to.

A. It is by reason of the fact that I have forgotten the exact dates.

Q. How many more loans did the insurance company have in the city of Chicago, approximately?

A. Several hundred, I should say, more or less.

Q. And that was with several hundred different people?

A. There were instances where two or three loans were made through the same parties, but these several hundred loans, more or less, represented a large number of people.

Q. Which brought you at that time into connection with a great many people concerning a great many loans?

A. Yes, sir.

Q. There was more than one proposition made by Kirchhoff, was there not, as to what he would do in settlement of the loan that the insurance company had on his wife's property?

A. To the best of my recollection, there was more than one proposition on both sides.

Q. Were there any propositions made by Kirchhoff to the company through you?

A. I believe that my letters or correspondence with the company state that certain propositions were made by the Kirchoffs to the insurance company concerning the loan.

Q. Can you tell from memory what in detail these propositions were?

A. I have stated in a general way as to the one of these propositions, I believe.

Q. I should like to know whether you can from memory tell what each one of these several propositions was.

A. There was one proposition made by the president of the insurance company at one time when he was here in Chicago to fund the entire indebtedness of the Kirchoffs to the insurance company into a new loan, and the insurance company were to take the
69 same property as security for the new loan at a reduced rate of interest, I believe four per cent., and another proposition.

Q. Was this proposition which you have last named carried out?

A. No, sir.

Q. Why not?

A. It was declined by the Kirchoffs.

Q. You may state any other propositions you remember now.

A. At another time, subsequent to the proposition I have referred to, a proposition was made to the Kirchoffs to sell them the property which they called their homestead at the valuation to be placed by James H. Reese, and the payments were to be one-tenth of the amount down and one-tenth a year until paid, with interest at the rate of six per cent.

Q. To whom was that proposition made?

A. Julius Kirchhoff, by the insurance company.

Q. Through whom?

A. I cannot state whether it was the president or vice-president or Mr. Seccomb, who, I believe, was chairman of the finance committee; it was by some one of these gentlemen when here in Chicago.

Q. Were you present?

A. Yes, sir.

Q. Where were you when it was made?

A. Probably in the office of the company.

Q. Don't you recollect where you were?

A. I should say in the office of the company.

Q. Do you recollect that you were there?

A. Only that most of such propositions were made there; I should presume that this was made there also.

Q. You have no distinct recollection, then, of being in the office when that proposition was made?

A. I don't remember distinctly as to that matter.

Q. Do you recollect what the language of the proposition was?

A. As near as I can state it, that the insurance company would allow Mr. Kirchoff to retain his property that he called his homestead at the valuation of the property to be fixed by James H. Rees.

Q. Do you recollect the date?

A. No, sir.

Q. Do you recollect the year?

A. I think it was in '78; I am not positive.

Q. What time in the year?

A. I don't remember.

Q. Was it in the summer or winter?

A. I don't remember.

Q. And do you not know which of the three persons you have named it was that made it?

A. No, sir; there was so much business of that kind; and as one of the three gentlemen was here nearly all the time, I could not state which one.

70 Q. They were not all here at once?

A. Frequently they were here all together, but some one of them was here nearly all the time.

Q. Do you know who else was present when this proposition was made?

A. I cannot state.

Q. What did Kirchoff say?

A. He said he would do it.

Q. What was he to do?

A. He was to give a quitclaim deed and was to pay a tenth of the appraised value of the property and a tenth every year until paid for; six per cent. interest.

Q. Did that include any other property?

A. As I recollect it, he had the option to take the lot upon which his house stood at the corner of Rush and Pearson street, and the lot cornering on it, fronting on Pine street.

Q. Was this talk with reference to any other lot except what you call the homestead property?

A. It was in reference to these two pieces of property; he had the option to take either one or both.

Q. Was this talk in reference to any property except these two pieces of property—was there any proposition made at the same time concerning other pieces of property?

A. I don't remember any proposition except as I have stated.

Q. You have not mentioned any other proposition at this same time?

A. These negotiations covered so much time that it is impossible for me to state exactly what other propositions, if any, were made at the time of the proposition for selling the homestead.

Q. There were a great many pieces of property covered by negotiations between the company and Mr. Kirchhoff at that time, were there not?

A. There was quite a good number of pieces of property covered by the trust deed from Kirchhoff to the company, and, as I understand the negotiations, all of the property embraced in the trust deed, including these two pieces, were to be quitclaimed to the company on consideration of his being allowed to retain the homestead at the price and on the terms which I have stated.

Q. The proposition was, then, that he should quitclaim on his part not only these two lots, but all of the property covered by the trust deed?

A. It was stated that if the Kirchoffs would quitclaim all of the property in the trust deed the insurance company would sell and reconvey to them the homestead property at the price to be fixed by Mr. Rees on the terms already stated, and it was understood at that time by myself and Mr. Kendall, the attorney of the company, that such quitclaim would perfect the title in the insurance company. After the quitclaim deed was given and recorded Mr. Kendall discovered that it would be necessary to go on with the foreclosure in order to perfect the title, which he did.

Continued to June 10th, 1884, at 2 o'clock p. m.

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JUNE 10TH, 1884—2 o'clock p. m.

Parties met pursuant to adjournment; same parties present.

Cross-examination of EDWIN A. WARFIELD continued by Mr. GROSSCUP:

Q. You have stated that you heard a conversation between some officer of the company and Mr. Kirchhoff, in which a proposition was made. Can you state any other time or place when you heard any conversation between any officer of the company and Mr. Kirchhoff concerning the homestead property?

A. I do not remember the exact dates, times, or places, but, to the best of my recollection, the conversation between Kirchhoff and any one of the officers of the insurance company were in my office, on La Salle St.

Q. Do you recollect more than one occasion when there was a conversation there?

A. Mr. Kirchoff visited the office sometimes two or three times in a week, and during these negotiations he may have been in the office anywhere from twenty to fifty times, more or less, I couldn't state, and at some of these interviews he met some of the officers of the company, at which times there was more or less conversation about these matters. I believe that there are letters written by me to Kirchoff in which he was invited to come to the office and meet certain officers of the company concerning the loan, but as to the exact dates, times, and places I am unable to state.

Q. Can you recollect any other occasion than the one you have named in which this agreement you have mentioned, viz., that Kirchoff should have the right to redeem the homestead property upon the payment of whatever the lots should be appraised at, was made?

A. I have stated that a proposition was made to fund the entire indebtedness of the Kirchoffs to the company and to take the same property as security for the loan on a basis of four per cent. interest and small payments on account of the principal spread over ten or twenty years; that was one of the propositions. I have already stated that another proposition was that the insurance company would sell the homestead property to the Kirchoffs at the valuation of James H. Rees.

Q. My question, Mr. Warfield, is whether the second proposition was made on more than one occasion, as you now recollect it.

A. I cannot state positively whether it was made on more than one occasion, as I now recollect it.

Q. And on the occasion upon which it was made you have no recollection which officer of the company was present, have you?

A. I am not positive, but I think it was the president of the company.

Q. Mr. De Witt?

A. Mr. De Witt.

Q. You have no recollection of the time when this occurred?

A. I could not state the exact time.

Q. Could you state the time approximately?

72 A. I think it was during the years '78 or '79.

Q. With reference to the quitclaim deed executed by Kirchoff and his wife, what time was it?

A. I think it was in '79—

Q. Was it before or after that quitclaim deed was executed?

A. I should say before.

Q. How long before?

A. It may have been a matter of a few months or it may have been a year or more than a year.

Q. It may have been a matter of a few months or a year or more than a year. You cannot state who was present, positively, except yourself and Mr. Kirchoff, can you?

A. Not positively. There was one or more of the officers of the

company besides Mr. Kirchoff and myself, but I could not state which one.

Q. Did you ever make any propositions to Mr. Kirchoff, except on this occasion, concerning the privilege of Kirchoff to have a reconveyance of the homestead property?

A. I don't know which one of the propositions you refer to.

Q. I refer to the proposition that Kirchoff was to have a reconveyance of the homestead property from the company upon paying to the company an amount of money equal to the valuation to be made by an appraiser.

A. My negotiations or conversations with Kirchoff about this matter were so many and spread over so much time that it is impossible for me to state anything more than the general substance of the various propositions.

Q. Have you any present recollection of any occasion upon which you made the proposition spoken of, that Kirchoff should have a reconveyance of his property upon certain terms, distinct from the occasion when the president of the company was present?

A. I remember a conversation with Kirchoff about this matter that took place in his saloon, at 124 Clark St., on one occasion.

Q. You may state what was said in that conversation in the saloon on Clark street.

A. I believe that at that interview the arrangements were made for going out to appraise this property with Mr. Reese. In pursuance of this arrangement—

Q. In pursuance of the former arrangement?

A. Yes; but, as I have before stated, I am not giving these dates and conversations only to the best of my recollection and belief.

Q. What other occasion do you remember when this proposition was spoken of?

A. I remember conversations in the office, but as to dates I could not state.

Q. Can you give what was said?

A. Only as I have already stated. I have stated the substance of the matter as fully as I am able at present.

73 Q. Can you state the substance of any other conversation in your office than the one between the officer of the company and Mr. Kirchoff?

A. I do not call to mind any one particular interview, but there was a good many of them.

Q. Covering a great many things?

A. Yes; in connection with this loan.

Q. Look at the letter that I now hand you and state if you received that letter from John A. De Witt. (Hands paper to witness.)

A. Yes, sir; I should say that that letter was received by me from John A. De Witt.

Q. Do you know to what it refers?

A. Yes, sir; I think I do.

Q. Do you know what Mr. De Witt referred to when he said, "We have today written Mr. Kendall that the Kirchoff offer was declined

and we will not sell for less than \$8,400"? What offer was this that was declined?

Objected to as not proper cross-examination and as being an examination of the witness respecting the contents of a letter which had not been introduced in evidence.

A. I believe that this letter is in answer to a letter from Mr. Kendall to the insurance company, in which he enclosed a deed for one or both pieces of the Kirchoff property for the company to execute in compliance with the proposition that I have referred to, and that the offer referred to in this letter by Mr. De Witt is Mr. Kirchoff's offer to pay the first payment at the expiration of six months instead of on delivery of the deed.

Q. Was not the offer of Mr. Kirchoff to pay \$7,000 for the lot?

A. I understood it to be \$7,500 for one and \$2,500 for the other.

Q. Is not that what Mr. De Witt has declined stating, that he will sell for not less than \$8,400?

Objected to for the reason that it calls for a legal opinion and because it is not cross-examination, and, thirdly, because it seeks an interpretation by the witness of a letter neither written by nor to him.

A. I believe that Mr. De Witt declined to accept the first cash payment at the end of six months, as suggested by Mr. Kendall in his letter to him. I do not know now and never did understand why he said, "We will not sell the property for less than \$8,400."

Q. Do you recollect of Mr. Kendall writing to the company at the time this deed was enclosed to them?

A. I understood at the time that he did write a letter and enclosed a deed for the company to execute.

Q. Did he consult with you when he wrote the letter?

A. I do not remember that he did; possibly he did, but I do not recollect it now. I will state that my recollections can be refreshed by an examination of the correspondence.

Adjourned to June 11th, 1884, 2 p. m.

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CHICAGO, June 11th, 1884—2 p. m.

Testimony of E. A. WARFIELD continued.

Cross-examination by Mr. GROSSCUP:

Q. Will you read the letter which is dated November 5th, 1879, and signed J. E. De Witt, and which you say you received from John E. De Witt?

Objection is made by Mr. Harbert on the ground that it is not proper cross-examination, the paper itself not being introduced in evidence.

A.—

153 TREMONT STREET, BOSTON, *November 5th*, 1879.

E. A. Warfield, Esq., 133 La Salle street, Chicago.

DEAR SIR: We have today written to Mr. Kendall that the Kirchoff offer was declined and that we will not sell for less than eighty-four hundred dollars. We want you to take possession of the house as soon as the matter is closed up. Please advise us.

Yours truly,

JOHN E. DE WITT, *President*.
C.

The reading of the letter is objected to on the part of the complainant.

Counsel for the defendant offer the letter as above read in evidence and mark the same Exhibit A.

Q. Did you receive that letter which I now show you in due course of mail?

A. I believe that I did.

Q. In whose handwriting is the signature attached to it?

Objection by Mr. Harbert on the ground that it is not proper cross-examination.

A. I believe it to be in the handwriting of a Mr. Cross.

Q. Did you understand it as coming from the company?

A. I did.

Q. You may read it.

Reading objected to by Mr. Harbert on the ground that it is not the proper method of showing the contents of a letter.

A.—

153 TREMONT STREET, BOSTON, *October 16th*, 1879.

E. A. Warfield, Esq., 133 La Salle street, Chicago.

DEAR SIR: Will you kindly inform us when we may expect to get the Kirchoff loan, 682, in shape for closing it up? We would like this matter wound up at as early a date as possible.

Yours truly,

JOHN E. DE WITT, *President*.
C.

Counsel for the defendant offer the said letter in evidence and mark the same Exhibit B, defendant.

Objection is made by the complain-t's counsel.

75 Q. Did you receive the letter which I now hand you in the due course of mail?

A. I believe that I did.

Q. Did that come to you from the company?

A. I should say that it did.

Q. You may read it.

Objection is made by Mr. Harbert.

A.—

153 TREMONT STREET, BOSTON, *December 3rd, 1879.*

E. A. Warfield, Esq.

DEAR SIR: Your favor of the 26th at hand in reference to loan 682, Kirchoff. If he does not pay his rent you have the usual remedy at hand, to put him out, and there is no reason why you should not.

Yours truly,

JOHN E. DE WITT, *President.*
W. G. R.

Said letter is also offered in evidence, marked Defendant's Exhibit C.

And objection is made to its introduction by Mr. Harbert as incompetent.

Q. Do you remember Mr. Kendall submitting the terms of an agreement by which Mr. Kirchoff was to repurchase his homestead to the defendant?

A. I cannot state whether Mr. Kendall submitted the proposition or not.

Q. Do you not remember that Mr. Kendall submitted the proposition at the same time that he enclosed a blank deed to the defendant for the homestead premises?

A. I understood that in the letter in which he enclosed a deed for the company to execute that he made a suggestion as to the change of the terms of payment to be made by Kirchoff.

Q. Were you present when the letter was written?

A. I do not believe that I ever saw the letter. I may have seen a letter-press copy, but I do not remember it now.

Q. Then you do not know what the contents of the letter were?

A. Only as I have stated, and I am not sure whether I got that from Mr. Kendall or from his letter-press copy.

Q. Was not the deed enclosed at that time to the company made out at seven thousand dollars?

A. I do not remember.

Q. Would you know the deed if you saw it?

A. I think that I would recognize the handwriting.

Q. Did you write that letter which I now show you?

A. I think that letter was written under my direction.

Q. Is that a letter-press copy made by yourself or by some one under your direction?

A. I should say that it is a letter-press copy made by a party under my direction.

76 Q. Did you send the letter of which that is a letter-press copy to the company?

A. I think that I did.

Q. You may read that letter.

Objection is made to the reading of the letter in evidence by Mr. Harbert on the ground of incompetency; also because it is immaterial, secondary, and not proper cross-examination.

CHICAGO, ILLINOIS, November 26, 1879.

I have waited some time in order that I might be able to report the settlement of 682, Kirchoff, but cannot do so yet. I saw Mr. Kirchoff a few days since and had him go with me to Mr. Kendall's office, but found Mr. Kendall absent. Mr. K. agreed to meet me at Mr. Kendall's office the same afternoon at four o'clock, and I have not been able to see him since. He claims that he settled with Mr. Kendall with the understanding that he was to purchase the homestead on the terms submitted some time since by Mr. Kendall, and Mr. Kendall says that such is not the case. I have possession of the house under a lease to Kirchoff, but he does not pay rent worth a cent.

Yours truly,

E. A. WARFIELD,
Financial Agent.

G.

Objection is made by the complainant's solicitor to the reading of the said letter on the ground that it is secondary evidence.

Q. You may state what loan is meant by loan 682.

A. The loan from the Union Mutual Life Insurance Company to the Kirchoffs for sixty thousand dollars, referred to in this case.

Q. Do you remember when the bill to foreclose this loan was filed?

A. I do not.

Q. Was it not the succeeding year, in August?

A. I could not state without reference to the papers.

Q. Who lived in the house from the fall of 1879 to the time the bill was filed?

A. I think the house was occupied by the Kirchoffs in 1879.

Q. Did they pay you rent?

A. I collected some rents as receiver appointed by the court.

Q. When they refused to pay you rent what was done?

A. I cannot state without reference to the papers in the case.

Q. Did you not apply to the court for a writ of assistance to put them out of possession?

A. I do not know whether I did or not.

Q. Have you any recollection of their being put out of possession?

A. No, sir; I have not.

Q. Did they remain in possession?

A. Well, I should say, to the best of my recollection, that
77 they were in possession when or up to the time that I resigned my receivership.

Q. When did you resign your receivership?

A. I think that that was in September, 1880, but I am not sure as to dates.

Q. Who succeeded you as receiver?

A. I believe James H. Gallery.

Q. Look at the quitclaim deed from Kirchoff and wife to the Union Mutual, which has already been introduced in evidence, and

state if it covers all the property that was covered by the trust deed.

A. I think that it does not embrace all the property covered by the deed of trust.

Q. Can you tell what property is not embraced in this quitclaim deed that was covered by the trust deed?

A. I believe that the property called the Diversey farm is not embraced in this quitclaim deed.

Q. Is there any other property besides the property known as the Diversey farm that is not embraced in this quitclaim deed?

A. I cannot state without reference to the trust deed. I understand that the property embraced in the quitclaim deed from the Kirchoffs to the insurance company embraced all the property owned by the Kirchoffs and held as security for the debt at the time the quitclaim deed was made. I also understand that the other property mentioned in the trust deed given to secure the loan which is not embraced in the quitclaim deed had either been released by the trustee from the operation of the trust deed or was owned by Mrs. Angela Diversey.

Q. The notes were originally made by Elizabeth Kirchoff and Julius Kirchoff and the deed of trust to secure the payment of those notes was made by Julius Kirchoff and Elizabeth Kirchoff upon their property, in which Angela Diversy joined upon her property?

A. That is as I understand it.

Q. Now the quitclaim deed omitted to convey to the insurance company the property mortgaged by Angela Diversy to secure these notes?

A. Yes, sir.

Q. Was it not understood and agreed at the time that the insurance company would take this quitclaim deed in full satisfaction of the entire debt and release Angela Diversy from her liability upon the debt?

A. I do not understand it exactly in that way. I do understand, however, that the quitclaim deed from the Kirchoffs was in satisfaction of the indebtedness against them.

Q. Was not the indebtedness against them the entire indebtedness for which the trust deed was given?

A. Yes.

Q. The effect of the quitclaim deed, then, was to discharge Mrs. Diversey's property from any liability to pay this indebtedness, was it not?

78 A. No, sir; I think not.

Q. Well, if not, why not?

A. I think the insurance company paid her or rather gave her some forty acres of land in consideration of her quitclaim deed, and in consideration of the Kirchoffs' quitclaim deed agreed to sell them the homestead, as stated.

Q. Do you say that Mrs. Diversy ever executed a quitclaim deed to the insurance company?

A. I so understand it.

Q. When?

A. I do not remember the dates. I should have to refer to the books or records. I also understand——

Q. Well, I wish you to answer my questions only. At about this time did Mrs. Diversy execute a quitclaim deed?

A. I think it was subsequent.

Q. Subsequent to the date of the Kirchoff quitclaim deed?

A. I believe so.

Q. If Mrs. Diversy never did execute to the insurance company a quitclaim deed, was not the effect, then, of the Kirchoff quitclaim deed to discharge Mrs. Diversy's property from liability upon these notes?

Objected to by Mr. Herbert as calling for a legal conclusion.

A. I think not.

Q. What part have you taken in the suit of Julius Kerchoff against the company to recover this homestead?

A. I have taken part as a witness in the case and Kerchoff has consulted me more or less about the matter.

Q. Have you made any offers to compromise the case?

A. No, sir; I have not.

Q. Have you any authority to compromise the case?

A. No, sir; not that I know of; I supposed I had written authority, but am unable to find any.

Q. Have you any interest in this case?

A. Not that I am aware of, except that I expect to be remunerated for my attendance.

Further examination is postponed until June 12th, 1884, at the hour of two o'clock p. m.

Continuation of the examination of E. A. WARFIELD before Mr. Voss, master in chancery of the circuit court of Cook county, June 13th, 1884, at ten o'clock a. m.

Redirect examination by Mr. HERBERT:

Q. Please state in what manner settlement was made with Mrs. Diversy.

A. The settlement was made with Mrs. Diversy by taking a deed from her for a portion of her property which was embraced in the trust deed given to secure the loan, the trustee releasing to her the balance of the property held in said trust deed and the insurance company releasing the judgment they held against her.

79 Q. Had the company taken judgment on the note or one of the notes secured by the trust deed?

A. It is my recollection that the insurance company entered up judgment against her under a judgment note, but I am not positive as to whether it was this way or not.

Q. How much land was released to Mrs. Diversy?

A. I believe there were forty acres.

Q. Do you know where the forty acres are situated?

Objected to by Mr. Grosscup, as the release is the best evidence of such fact or facts.

A. Forty acres, I believe, are situated in the portion of the southwest quarter of section 28, township 42, range 13, Cook county, Illinois.

Q. I am not asking for the legal description, but for the general description.

A. It is a little west of north from the city and about half way between the stations of Wilmette and Winnetka, on the Chicago and Northwestern railway.

Q. Do you know about when this release was made, the release from the company to Mrs. Diversy, with reference to the deed from Kirchoff to the insurance company?

A. I believe that they were made at substantially the same time.

Question and answer objected to by Mr. Grosscup for the reason that it is not the best evidence.

Q. How was it with reference to the deed from Mrs. Diversy to the insurance company?

Objected to as calling for parol proof of written instruments.

A. I believe that they bear substantially the same date.

Q. Now, please state whether or not the settlement with Mrs. Kirchoff and the settlement with Mrs. Diversy were or were not part and parcel of one and the same agreement or transaction.

A. They were substantially the same transaction.

Q. Now, please state fully the terms and agreements of the settlements with these parties which were made at that time.

Objected to for the reason that it is repetition and properly being examination-in-chief.

A. The settlement with Mrs. Diversy was by taking her deed covering from 85 to 95 acres of land, more or less, which was held under the trust deed as a part of the security for the Kirchoff loan and by the releasing of the balance of her property in said trust deed to her and the releasing of the judgment held by the insurance company against her. As I have previously stated, the proposed settlement with the Kirchoffs was the sale of the homestead property to them at a price to be fixed by James H. Reese and on terms that I have already stated, the Kirchoffs to execute a quitclaim deed to the insurance company, which was understood at that
80 time would perfect the title to the property in the insurance company—the property held in this Kirchoff loan.

Q. Was it not true that by this settlement with Mrs. Diversy and Mrs. Kirchoff the company obtained a correction of an error in the description in one or more of the parcels of property in the trust deed?

A. There was a clerical error in the description of some of the property embraced in said trust deed, and by the deed from Mrs. Diversy to the insurance company a correction was made.

Objected to as being secondary evidence.

Q. To whom, if you know, did Mrs. Diversy deliver her deed?

A. I think it was to Mr. Kendall, the attorney for the company.

Q. To whom, if you know, did Mrs. Kirchhoff deliver her deed to the company?

A. I could not state whether it was Mr. Kendall or myself.

Q. Was the deed from Mr. and Mrs. Kirchhoff to the company, to your knowledge, ever tendered back to them or either of them?

A. It was not to my knowledge.

Q. Were Mr. or Mrs. Kirchhoff ever told, so far as you know, that the company did not intend to comply with its agreements?

A. Not to my knowledge.

Q. Mr. Kirchhoff paid, as I understand by your testimony, some money to you as rent for the property—of the homestead property. Please state how that money was to be applied or whether you told him it should be applied in any particular way.

Question objected to.

A. When I took the lease to Kirchhoff to sign with me as receiver appointed by the court I stated to him—

Q. Please answer that question. State the conversation.

A. That the rents which he paid on the homestead property would reduce his debt the amount of the rent he paid.

Q. How long after the Kirchhoff quitclaim deed to the company was it that you or Mr. Kendall discovered that the title was not perfected by the quitclaim deed?

A. It was not until after the quitclaim deed to the insurance company had been recorded and Mr. Kendall procured abstracts of title to the various pieces of property that he discovered that the title was not perfected by the quitclaim deed to the insurance company.

Q. What, if any, conversation thereupon occurred between Mr. or Mrs. Kirchhoff and yourself or any other officer of the company in your presence relative to the necessity for foreclosure?

A. After it was discovered that the title was not perfected by the quitclaim deed to the insurance company and Mr. Kendall decided to go on with his bill to foreclose he served a notice to that effect on Kirchhoff, and he came to me to inquire what it meant, and I told Mr. Kirchhoff that the title was not perfect or satisfactory to Mr. Kendall, and that in order to perfect the title that he would have to go on and make a foreclosure in the courts, and I referred
81 him to Mr. Kendall and told him that Mr. Kendall could explain the matter to him better than I could.

Q. What, if anything, was said at that time in relation to the foreclosure affecting the rights as to the reconveyance of the homestead?

A. I told him that it would not make any difference, but referred him to Mr. Kendall for further particulars.

Q. Why could you not at that time, why could not the company at that time have given him a deed and taken the mortgage back?

Objected to.

A. The reason was that the company did not hold a good title and they could not make a good title to him; neither could he make a good title under his mortgage back to the insurance company.

Q. Did Mr. Rees make an appraisal of other property than the homestead at the time he appraised the two parcels known as the homestead property?

A. I believe that he did.

Q. Did the company offer to sell any of the other property to other parties at any particular sum corresponding with the appraisal?

A. The company offered to sell any property that they held title to at the values of Mr. Rees and Mr. Morey.

Q. Was the arrangement with the Kirchoffs at the time it was made regarded by the company as a considerable concession to them or not?

Objected to as being improper.

A. I did not regard it as any concessions to the Kirchoffs, for the reason that if the insurance company held the title to the property we would have sold it to anybody else at the same price and on the same terms, at that time.

Q. Was any conveyance ever tendered the Kirchoffs, to your knowledge, and any demand made of them for payment?

A. Not to my knowledge.

Q. How soon after the arrangement with the Kirchoffs for a conveyance to them of the property under the terms you have testified was it before the homestead property began to appreciate in value?

A. I believe it was about six months or a year.

Q. When did the company obtain such title to the property as would have enabled it to have complied with its contract with the Kirchoffs?

Objected to.

A. To the best of my recollection, it was some time during the year 1881.

Q. On the happening of what event?

A. On the execution of the deed from the master in chancery to the insurance company.

Q. You have stated when the negotiations with the Kirchoffs began. Please state when the negotiations with the Diversys—Mrs. Diversy—began; whether at or about the same time or at a different time.

A. I believe it was about the same time.

Q. Was the agreement concerning the settlement of the transaction covered by the trust deed fully consummated so far as Mrs. Diversy was concerned?

A. I believe that it was.

Q. Are Mr. Kirchoff and Mrs. Diversy related; and, if so, in what way?

A. Mrs. Elizabeth Kirchoff is the daughter of Mrs. Angela Diversy.

Q. Then all the property in the trust deed belonged to the mother or the daughter?

A. I believed it belonged to the mother or the daughter or Kirchoff, the husband of the daughter.

Q. How many conversations, if you know, did you have with Mr. or Mrs. Kirchoff regarding this settlement subsequent to the institution of the foreclosure proceedings and prior to the issuance of the master's deed?

A. I could not state the number of interviews. I should say that there were quite a number of them.

Q. Please narrate these conversations if you can; and, if not, please give the substance of them.

A. I am unable to narrate these interviews, except in a general way. There were a good many of them, at various times and places. At one of these interviews there was some talk about the Kirchoffs selling a portion of this property to the parties who owned the adjoining property—the property adjoining his homestead on the east—at such time as he acquired title to the property.

Q. Can you give that conversation more fully?

Question objected to.

A. Well, I should say that I saw the Kirchoffs several times in relation to a sale of the east sixty feet of his homestead lots to Mr. Isham or Mr. Prentiss at their request, and I tried at that time to get from him a fixed price at which he would make a conveyance whenever the title should be perfected.

Q. How was the title to be perfected?

A. It was to be perfected, as I understood, by a foreclosure and a deed from the master to the insurance company.

Q. How was it to be perfected in Mr. and Mrs. Kirchoff by the insurance company?

A. The only way I know of is by a deed from the company to the Kirchoffs.

Q. Please state whether or not in all or most of such conversations the right of the Kirchoffs to a reconveyance of the property on the terms previously arranged for was recognized?

Objected to.

83 A. I never told him that the negotiations were off. I never heard him say anything, except in the direction of acquiring title to the property.

Q. Were or were not the officers of the insurance company informed of the situation of matters with reference to the Kirchoff transaction?

Objected to as not the best evidence.

A. I have already stated that the officers of the insurance company were informed as to my negotiations.

Q. Were the officers of the company or either of them, to your

12—155

knowledge, present at any of these conversations which you have referred to as occurring between Mr. and Mrs. Kirchoff and yourself subsequent to the foreclosure proceedings?

A. I cannot remember as to the number of interviews between the officers of the company or the Kirchoffs as to whether they were prior or subsequent to the commencement of the foreclosure proceedings.

Q. Reference has been made to an offer from Kirchoff through Kendall to the company, which it is alleged De Witt declined. What offer was referred to there?

A. As I have already stated, I understand that in the letter from Mr. Kendall inclosing the deed for the insurance company to sign conveying this property to the Kirchoffs he made a suggestion that the Kirchoffs pay the first payment at the expiration of six months. As I understand the phraseology in that letter in which the president says Kirchoff's offer is declined, that he refers to the offer to pay the first payment at the expiration of six months instead of at the beginning of the year.

Q. Was it or was it not contemplated that the transaction would be closed without the foreclosure?

A. I think that it was.

Q. Please state whether or not at or during the latter part of the year 1879 the president of the insurance company or some other of the general officers was here.

A. I believe that the president of the company was here during the first week in October or during the first two weeks in the month of October, 1879, and I should say that he was here once between that time and the first of January, 1880.

Q. At such times were or were not the contents of previous correspondence discussed?

A. These matters were pretty generally discussed and gone over during the time the officers of the company were here.

Q. Who prepared the deed to be executed from the company to the Kirchoffs?

A. It was prepared by R. B. Kendall, the attorney for the company.

Q. Who was the vice-president of the company in 1879 & 1880?

A. Mr. Daniel Sharp.

Q. Was he here also in 1879 and 1880?

A. He was at various times.

84 Q. Did you receive instructions from him—oral instructions from him—at such times in regard to the business of the company?

A. I did.

Q. Did you make any arrangements in regard to loans or settlements of loans, and especially in regard to the transaction in question, which was not communicated to the company either by letter or through its officers orally?

A. I think not.

Q. Your attention was called to a letter in which occurs the following sentence: He (Kirchoff) claims that he settled with Mr. Ken-

dall with the understanding that he was to purchase the homestead on the terms submitted some time since by Mr. Kendall, and Mr. Kendall says that such is not the case. Was there any other difference or question, to your knowledge, between Mr. Kendall and Mr. Kirchoff with reference to the closing the transaction except as to the time of the first payment?

A. I do not call to mind any at this time.

Q. Please state whether that difference was very strongly urged by Mr. Kirchoff.

A. That difference, I think, Mr. Kirchoff understood that he had settled with Mr. Kendall on the basis of paying the money at the end of the six months, and Mr. Kendall said that he had not, but that he submitted the suggestions to the company that they accept the money at the end of six months.

Q. Had the value of the property considerably appreciated or not by the time the company obtained the master's deed?

A. It had appreciated.

Adjourned until June 18th, 1884, at two o'clock.

JUNE 18TH, 1884.

Further adjourned to 25th instant, at 2 o'clock p. m.

JUNE 25TH, 1884.

Parties met pursuant to adjournment.

Examination of EDWIN A. WARFIELD continued.

Recross-examination by Mr. GROSSCUP:

Q. Mr. Warfield, did you at any time personally, as agent for the Union Mutual Life Insurance Company, make an agreement with either Mr. or Mrs. Kirchoff that the insurance company would convey to them or either of them what is known as the homestead property for the sum of \$7,500 and upon the payments of \$1,000 each year, secured by mortgage, with interest at six per cent.?

A. Personally as agent of the company I did not. I did, however, submit to the Kirchoffs a proposition from the company in which it was proposed to sell them what was called the homestead property on certain terms and conditions.

Q. What you did, then, in this matter was to submit to the Kirchoffs propositions as propositions coming from the company?

A. Yes, sir.

85 Q. Did you inform the Kirchoffs, upon the occasion of submitting these propositions, that they were propositions coming from the company?

A. I cannot state positively, but my impressions are that I did.

Q. Will you state from what officer of the company this proposition came to you to be submitted to the Kirchoffs?

A. I cannot state positively, but the probabilities are that it came from Mr. De Witt, the president of the company.

Q. Did the proposition come to you orally or in writing?

A. I could not state which. I received propositions both in writing and orally.

Q. Cannot you state how this particular proposition, that the company was to reconvey the homestead property to the Kirchoffs, came to you?

A. I cannot.

Q. Can you state the date at which Mr. De Witt gave you this proposition to submit to the Kirchoffs?

A. I cannot.

Q. Can you state approximately the date?

A. Oh, I should presume it might have been in '78 or in '79.

Q. Cannot you state any more approximately than that?

A. No, sir; I cannot.

Q. After you submitted this proposition to the Kirchoffs on behalf of the company, how long a time intervened before it was accepted by them?

A. In every case when I spoke to him about this proposition he always said he would do it. It was accepted then. Whenever I talked to him about it he said it was all right. He would do it.

Q. Did you communicate the fact to the company that you had made such a proposition to the Kirchoffs, and that it had been accepted by them?

A. Whatever I did in the matter was communicated to the company or its officers.

Q. That does not answer my question, Mr. Warfield. Did you ever communicate to the company that you had submitted a proposition to the Kirchoffs that the company would reconvey to them any portion of these premises upon the terms you have already stated, and that such proposition had been accepted by them?

A. I communicated to the company all that I did in the matter. Just in what way or what I said or what I wrote it is impossible for me to state unless I can see the correspondence, if it was a matter of correspondence, and if it was a matter of personal conversation between myself and the officers of the company I cannot state anything more definitely than what I have stated.

Q. Cannot you state from memory whether you ever communicated to the company that you had submitted to the Kirchoffs a proposition that the company would reconvey to them the premises known as the homestead premises upon the terms you have named, and that the Kirchoffs had accepted that proposition?

86 A. I cannot. I have some recollections about the matter; it is spread over so much time, and during this time I, on more than one occasion, probably, got out of patience with them, waiting for the matter to be closed up.

Q. Out of patience with whom?

A. With the Kirchoffs. This matter, to the best of my recollection, covered nearly three years' time and was the subject of a large number of personal interviews. It is impossible for me to recollect the dates and places. I have stated as near as I can remember; but, as I said before, I have some recollection of getting out of patience on more than one occasion and advising some course to be

pursued to close up the matter, as the company were pushing me to get a settlement with the Kirchoffs, and I believe that on one occasion I thought the shortest way was a foreclosure.

Q. Did this impatience with the Kirchoffs continue after you had made the proposition to them that the company would reconvey a part of the homestead and after they had accepted it?

A. As I said before, when the proposition was made to them he said it was all right; that he would do it; but time dragged along for some reason or other, and I received, to the best of my recollection, a number of letters urging me to get this matter settled up, which might have been one year or two years or longer from the date of the original agreement.

Q. Do you know when the blank deed was sent to the company for them to execute, conveying the property on the corner of Pearson and Rush streets to Mr. Kirchoff?

A. I do not remember the date.

Q. Did you know of its having been sent?

A. I believe that Mr. Kendall informed me at the time that he sent it.

Q. Did Mr. Kirchoff know of its having been sent?

A. I don't know.

Q. Did that deed embrace the consideration that was a part of your proposition to Mr. Kirchoff and that was accepted by him, you say?

Objected to as not the best evidence and for lack of perspicuity.

A. I could not state the consideration that was named in that deed without a reference to the deed. I have an indistinct recollection that it covered but one lot. I also have an indistinct recollection that there was to have been another deed for the other lot, but this is not very clear in my mind just at this time.

Q. Was that deed sent as a part of your negotiations with Mr. and Mrs. Kirchoff, or was it sent as a new negotiation between you and the Kirchoffs?

A. I should say that the deed was sent as coming out of the proposition that I made to the Kirchoffs, but I believe that the deed was sent by Mr. Kendall and I cannot state exactly what Mr. Kendall said to Mr. Kirchoff at the time he prepared that deed for the company to execute.

87 Q. Were you the agent for the company when the Kirchoffs obtained their loan?

A. I believe I was in the employ of the company, but I was not in Chicago.

Q. The amount of the loan was \$60,000?

A. I believe that was the amount.

Q. Do you know what use was made of the money by the Kirchoffs?

A. I do not.

Q. Do you know to whom it went?

A. I do not.

Q. Who executed the notes for it?

A. I believe Elizabeth Kirchoff and husband, but I am not positive.

Q. Do you know, either from what you knew at that time or from subsequent conversations with the Kirchoffs and Mrs. Diversey, whether Mrs. Diversey got any of that money?

Objected to as incompetent and immaterial.

A. I do not.

Q. What is your understanding on that subject?

Same objection.

A. I have none whatever.

Q. The notes were executed by Mr. and Mrs. Kirchoff and were secured by a trust deed upon the property of Mrs. Kirchoff and also upon the property of Mrs. Diversey, was it not?

A. That is the way I recollect it, without a reference to the papers.

Q. Do you recollect when judgment was taken upon that note, if ever?

A. I think it was during the year 1878, but I am not positive.

Q. Was judgment also taken against Mrs. Diversey?

A. I believe it was.

Q. And did not the company in that way, through your and Mr. Kendall's proceeding, claim to hold a lien upon all the property of both Mr. and Mrs. Kirchoff and Mrs. Diversey under the judgment?

A. I suppose that the judgment did rest upon any property belonging to either of the parties.

Q. Was not that the object of taking the judgment?

A. It was.

Q. Do you know for what amount that judgment was obtained?

A. I don't remember.

Q. Can you recollect, in round numbers, for what amount it was obtained?

A. I should say \$80,000 or more.

Q. Did Mrs. Diversey have any other children besides Mrs. Kirchoff?

A. Yes, sir.

Q. Did you have any negotiations with Mrs. Diversey and her other children as well as Mr. and Mrs. Kirchoff?

88 A. I don't remember that I did.

Q. Was it not also agreed that the company should release its lien upon the property of Mrs. Diversey obtained both by the trust deed and by the judgment entered up against her?

A. That is as I understand it.

Q. Was that a part of this same transaction between you and the Kirchoffs?

A. As I have had so little, if anything, to do with the matter of the judgment, I cannot state whether that can be considered a part of the same transaction or not; the judgment was entered by the attorney of the company, and nearly all, if not all, the negotia-

tions, so far as that judgment was concerned, were conducted by him.

Q. Was it not your understanding that the negotiations which terminated in the giving of the quitclaim deeds upon the part of Mr. and Mrs. Kirchoff, and also upon the part of Mrs. Diversey, should relinquish all other and further liens that the company had upon their several properties?

A. It was.

Q. Were those negotiations substantially one transaction or not?

A. The negotiations, so far as the judgment is concerned, I had so little to do with that I could not state exactly how they were regarded, but I believe it was substantially one matter.

Q. Was it your understanding that the Kirchoffs would have executed that quitclaim deed in any other connection than that the company should release its lien both upon their property and upon Mrs. Diversey's property, taking from Mrs. Diversey a quitclaim deed for a portion of the property that was included in her quitclaim deed?

A. I cannot say whether the Kirchoffs would have executed the quitclaim deed to the company or not under any other circumstances; I believe the deed from Mrs. Diversey to the company was a warranty deed and not a quitclaim.

Q. You understand, then, that the negotiations culminated in this, do you not, that Mr. and Mrs. Kirchoff should execute their quitclaim deed for the property included in the quitclaim; that Mrs. Diversey should execute her deed, whether warranty or quitclaim, for the property included, and that the company should relinquish all its right, title, and interest in the properties of both and should reconvey to the Kirchoffs the homestead property upon the terms you have named?

A. I understand that the Kirchoffs executed a quitclaim deed to the insurance company in satisfaction of the indebtedness against them, with the understanding on the part of the Kirchoffs that they could buy the homestead property, as stated, and that Mrs. Diversey gave a deed to the insurance company with the understanding that the judgment against her should be released and that she should be allowed to retain some forty acres of the property which belonged

89 to her, which she had given as a part of the security for the Kirchoff loan. As to the dates of these deeds or as to the exact time, I cannot state positively, the negotiations concerning these matters having covered nearly three years.

Q. The giving of this quitclaim deed, then, by the Kirchoffs was to be a satisfaction of the entire indebtedness, taken in connection with what portion of the property Mrs. Diversey quitclaimed or conveyed to the company by warranty deed?

A. I do not understand the question.

Q. Was one of the considerations upon which the Kirchoffs gave the quitclaim deed to the company to be this: that it should be in satisfaction of the entire indebtedness of the company against the Kirchoffs and Mrs. Diversey upon their notes, mortgage, and judgment?

A. As I recollect it now, the quitclaim deed from the Kirchoffs to the insurance company stated that it was in satisfaction of the indebtedness against the Kirchoffs. The deed from Mrs. Diversey, being another matter, was a subject of other negotiations, and I have stated that I think the deed from her was in consideration of the company's releasing the judgment against her and allowing her to retain forty acres of land that the insurance company held as security for the Kirchoff loan.

Q. Do you know if the Kirchoffs would have executed their quitclaim deed to the company if the company had not also agreed to release Mrs. Diversey from her liability upon the loan?

A. I do not.

Q. What the quitclaim deed expressed upon its face, then, that it was to be in satisfaction of the indebtedness against the Kirchoffs' entire loan, was true, as a matter of fact, was it not?

A. I could not state that, as the matter of the preparation of the quitclaim deed was conducted by Mr. Kendall, the attorney of the company.

Q. Did you have any part in making the negotiations for the quitclaim deed?

A. I don't remember just what part I took in that matter.

Q. Was not the making of the quitclaim deed included in the propositions that you made Mr. and Mrs. Kirchoff?

A. As I understood it, Mr. Kendall, the attorney of the company, desired the quitclaim deed to save the expense of a foreclosure, and, as he did not have abstracts of title to the various pieces of property held as security for the loan, he preferred to take a quitclaim deed instead of going on with the foreclosure, if in fact he had commenced it; I don't remember. Mr. Kendall and myself got estimates as to the cost of procuring abstracts of title to the various pieces of property, and, as I recollect it now, it amounted to some \$1.100, and Mr. Kendall thought that a quitclaim deed, as I said before, would save the expense of a foreclosure, and this proposition to sell the homestead was made about that time. Mr. Kendall after some time succeeded in getting copies of abstracts of the various pieces of property, and after the deed from the Kirchoffs to the company was recorded he discovered that the title was not satisfactory to him and went on with his foreclosure, so that concerning the negotiations for the quitclaim deed I cannot state just what part I took in the matter.

Q. Do you not recollect that it was a part of the proposition that you submitted to Mr. Kirchoff to reconvey to them the homestead property, as you have already detailed it, the Kirchoffs on their part to make to the company the quitclaim deed?

A. That is as I recollect it now.

Q. Do you not recollect, then, what that quitclaim deed was to be given for?

A. I suppose that it was in satisfaction of the indebtedness against the Kirchoffs.

Q. If you received from the insurance company at any time any letter informing you, in substance, that they would not reconvey

to the Kirchoffs any portion of the property known as the homestead property for a less sum than \$8,400, did you after that do anything that was contrary to that statement of intention on their part?

A. I think not.

Q. At the time you had run of the correspondence between you and Mr. Kendall and the company, had you not?

A. Mr. Kendall's correspondence I did not have free access to, but all the correspondence between myself and the company I had personal charge of.

Q. And you followed out the intentions, purposes, and instructions of the company as contained in those letters, did you not?

A. So far as I was able to do.

Q. When you received the letter dated December 3rd, 1879, in which the company stated that if Kirchhoff did not pay his rent you had the usual remedy at hand to put him out, and that "there is no reason why you should not," did you not understand that if he would not pay his rent it was the wish of the company that you should put him out?

Objected to as immaterial.

A. I regarded it as a suggestion that in case he did not pay, to put him out.

Q. Now, did you after receiving that letter ever tell Mr. Kirchhoff that these rents were to be applied, not as rents, but as payments upon the property?

A. The only time I remember ever making that statement to him is the time that he signed the lease. I do not think I made that statement after that.

Q. Was the lease in writing?

A. Yes, sir.

Q. Did it in its body say that the sum of money to be received by the Kirchoffs for rents was to be applied upon the payment of principal?

A. I think not.

Q. It spoke of it as rents, did it not?

A. That is as I recollect it now.

Q. In your letter of November 26th, 1879, you say that
91 he, Kirchhoff, "claims that he settled with Mr. Kendall, with the understanding that he was to purchase the homestead upon the terms submitted some time since by Mr. Kendall." Did you know when you wrote that letter what those terms submitted by Mr. Kendall were?

A. Only as I have already stated, that the first payment was to be made at the end of six months instead of at the beginning of the six months.

Q. Did Mr. Kendall say that that was not the agreement?

Objected to as immaterial.

A. As I recollect it, Mr. Kendall said that he submitted it as

proposition and Mr. Kirchoff understood that it had been agreed to. That is the way that I recollect it now.

Q. That Mr. Kendall had submitted it as a proposition and Mr. Kirchoff understood it as an agreement?

A. That is as I understand it now.

Q. Do you say that the controversy between Mr. Kirchoff and Mr. Kendall, at the time named in your letter of November 26th, was merely upon the point whether the first payment should be a cash payment or should be a payment six months after?

A. I have no recollection of any controversy between Mr. Kendall and Mr. Kirchoff. I stated in my letter to which you refer that Mr. Kendall said to me that he had not settled with Mr. Kirchoff, fixing the time of payment at the end of six months instead of the beginning of six months, but Mr. Kendall had submitted it to the company.

Q. Have you a clear recollection that that was the point of the letter—namely, simply the difference between whether the first payment should be cash or six months thereafter?

A. My recollection is not particularly clear on this point, but I do not see what else it could refer to.

Q. Did Mr. Kirchoff claim that by the agreement the first payment was to be six months after the making of the deed and not to be a cash payment?

A. I do not remember what claim Mr. Kirchoff made. This is as I recollect it: I went to see Kirchoff in connection with the settlement of this matter and was told by him that he had fixed the matter with Mr. Kendall. Not having been apprised of any arrangements, I took him to Mr. Kendall's office with me, found Mr. Kendall absent and made an arrangement with Kirchoff to meet him at Kendall's office the same day again, but Mr. Kirchoff did not keep the appointment. I had some conversation with Mr. Kendall, in which Mr. Kendall said that he had not settled the matter. In my letter to which you refer this is what I referred to.

Q. That he had not settled the matter with Kirchoff?

A. I so understood from Kendall that he had not made a positive settlement, but Mr. Kendall had written to the company suggesting that a change be made in the terms of payment by the Kirchoffs.

92 Q. Why did you go to Mr. Kendall? Had you not the making of these propositions and their acceptance upon the part of Kirchoff within your control?

A. I went to Mr. Kendall as it was my custom to do in all cases where we were negotiating matters jointly. As to the making of these propositions and their acceptance, I have repeatedly stated my relations to be that I submitted propositions from the company to Kirchoff and any propositions which Kirchoff might make to the company for their consideration.

Q. If you before that time had made a proposition to Kirchoff for a reconveyance of the homestead to him, one of the terms of which was that the first payment should be a cash payment, and Mr. Kirchoff had accepted that proposition, why did you not so state to

Mr. Kendall when he told you that he had made no such agreement?

A. Mr. Kendall understood the matter as thoroughly as I did myself. I have no doubt that the matter of the first payment to be made in advance was talked over between Mr. Kendall and myself on quite a number of occasions and Mr. Kendall understood it just as well as I did. I believe that for some reason Mr. Kirchoff desired to change the negotiations and saw fit to consult with Mr. Kendall as to making the change.

Q. You say here that Mr. Kirchoff insisted that the original agreement was that the first payment should be within six months after the making of the deed and not a cash payment?

A. I have stated that Mr. Kirchoff told me that his understanding of my proposition was that the money was to be paid at the end of the year instead of the beginning of the year, and that the suggestion of Mr. Kendall that it be made at the end of six months was a compromise between Mr. Kirchoff's understanding and my proposition.

Q. Was that your understanding when you made the proposition?

A. My understanding was that the payment was to be made on the delivery of the deed to the Kirchoffs.

Q. And Kirchoff claimed that the proposition was that it was to be paid at the end of the year?

A. He so said to me.

Q. And then the proposition was taken to Mr. Kendall?

A. I do not so understand it. I did understand that Mr. Kirchoff for some reason went to Mr. Kendall and told him that he would make the payment at the end of six months, and I understand that Mr. Kendall wrote to the company about the matter.

Q. Let me see if I understand it. When you made the proposition to Mr. Kirchoff one of the terms of your proposition was that the first payment should be made upon the delivery of the deed; afterwards Mr. Kirchoff stated to Mr. Kendall that he understood that the first payment was to be made at the end of the first year, and Mr. Kendall thereupon wrote to the company stating that Mr. Kirchoff claimed that the first payment was to be made at the end of six months. Is that true?

93 A. I will restate it. The probabilities are that on more than one occasion Mr. Kendall was present when this matter was talked over with Mr. Kirchoff, and the proposition was that he purchase the homestead on Mr. Rees' valuation, the terms to be ten per cent. of the valuation in cash and ten per cent. a year until paid, with interest; after some time had elapsed—I cannot say how much—it appears that Mr. Kirchoff was under the impression that the first payment was to be made at the end of the year instead of the beginning of the year; my understanding was that it was to be at the beginning of the year or on the delivery of the deed from the company, and for some reason, as he had previously talked with Mr. Kendall and myself together, he went to Mr. Kendall and thought that he had fixed the matter with him by making the first

payment at the end of six months instead of the beginning of six months or on the delivery of the deed, and Mr. Kendall said that he had not settled the matter with him on that basis, but had written to the company making a suggestion that they accept the payment at the end of six months.

Adjourned to 27th instant, at 9.30 a. m.

JUNE 27TH, 1884—ten o'clock a. m.

Testimony of E. A. WARFIELD continued :

It is here agreed between the respective counsel that the homestead property heretofore testified about by Mr. Warfield and by Kirchoff is the property described in the bill, to wit, lots two and four, in block twenty-one, in the Canal Trustees' subdivision of the south fractional quarter of section three, township thirty-nine north, range fourteen, in Cook county, Illinois.

Direct examination by Mr. HARBERT :

Q. Who has the correspondence between you and the company in relation to this matter?

A. I believe that all the correspondence in the matter are held by the Union Mutual Life Insurance Company.

Q. Did you transfer the same to the defendant company?

A. The correspondence in this case was taken by the company from our office here in the city of Chicago.

Q. You have stated in effect in answer to a question put to you by Mr. Grosseup that the conveyance by the Kirchoffs was to be in satisfaction of any claim the company had against them. Was that the only consideration for the deed? Did you wish to be understood as meaning, or saying, rather, that that was the only consideration for the deed?

A. The understanding in regard to the quitclaim deed from the Kirchoffs to the insurance company was that it would save the expense of a foreclosure, and the insurance company, in consideration of this quitclaim deed, was to sell to the Kirchoffs what was known as the homestead property at whatever price it was worth; the price to be fixed and determined by Mr. James H. Rees. So far as

94 the Kirchoffs were concerned this is substantially as I understand the arrangement.

Q. They were also to be released from liability on the notes, were they not?

A. I so understood it.

Q. You have spoken about a judgment being entered against Mrs. Diversey. Does that fact refresh your recollection as to who signed the notes and as to whether she joined in the notes or some of them?

A. It does, and I should say that she signed the note in connection with the Kirchoffs.

Q. You have testified that you have endeavored to follow written instructions received of the company in letters. Please state

whether or not you received also during this period instructions relative to the same matters orally which you also endeavored to follow out.

A. I received written instructions and oral instructions concerning this and other matters and endeavored to carry them out.

Q. In cases where action was necessary and no instructions were received please state whether or not you exercised discretion in respect to your conduct touching the same.

A. In cases where it was necessary I think that I did.

Q. You have stated that Mr. Kirchoff claimed that he was to have within the year to make his first payment, and that you claimed that he was to make the first payment on the delivery of the deed. Please state whether this difference was talked over between the Kirchoffs and yourself or Mr. Kendall in your presence as a serious matter or otherwise.

A. The matter was talked over between Mr. Kendall and Mr. Kirchoff and myself, and I never regarded it as a serious matter. In fact, I do not understand that the Kirchoffs insisted upon it.

Q. Do you understand the arrangement to have been that the Kirchoffs should have the two pieces known as the homestead property or that they should have the two or either of them at the appraised value?

A. I understand that he was to have either one or both, just as he desired.

Q. Do you know whether the deed was prepared for the company to sign for both pieces or for one, and if for both were they together or separate? Please state the facts.

A. I do not remember of but one deed being prepared for the company to execute, and to the best of my recollection that covered but one piece.

Q. What was to be done with respect to the other? What did they decide to do with respect to the other?

A. In regard to the other it was to be sold at the price fixed by Mr. James H. Rees.

Q. In case the Kirchoffs did not decide to take it?

A. Yes, sir.

95 Counsel for the complainant gives notice to the counsel for the defendant that he would like to have present at the next adjournment the quitclaim deed prepared for the signature of the Union Mutual Insurance Company, purporting to convey to Elizabeth Kirchoff the homestead property or part of it, also the appraisement of Mr. Reese, for the inspection of counsel for the complainant and with a view of introducing in evidence such parts or portions thereof as shall seem proper, the correspondence between Mr. Kendall or Mr. Warfield to the company respecting the Kirchoff loan.

Counsel for the defendant will be happy to furnish counsel for the complainant any papers that the defendant may have in his possession, and will produce before the master all the letters between the company and Kendall and Warfield.

EDWIN A. WARFIELD.

Adjourned until July 3rd, 1884, at ten o'clock a. m.

EDWIN A. WARFIELD.

KIRCHOFF }
vs.
 U. M. INS. Co. }

MARCH 9TH, 1885.

Present: W. S. Harbert, for plaintiff, and Edwin R. Swett, for defendants.

EDWIN A. WARFIELD.

Redirect examination by Mr. HARBERT:

Q. I desire, Mr. Warfield, to call your attention to a letter to the company written by you, dated November 26th, 1879, set out in your cross-examination, in which you say, "I saw Mr. Kirchoff a few days since and had him go with me to Mr. Kendall's office, but found Mr. Kendall absent. Mr. K. agreed to meet me at Mr. Kendall's office the same afternoon at four o'clock, and I have not been able to see him since." Please state the purpose of your going to Mr. Kendall's office with Mr. Kirchoff, as well as your object in making an appointment to meet Mr. Kendall and Mr. Kirchoff at Mr. Kendall's office the same afternoon.

A. I saw Mr. Kirchoff some days preceding the date of this letter, and he wanted to know from me why the foreclosure suit was going on, as he thought that matter had been settled under this agreement between himself and the company to purchase the homestead property, and as that was a matter in the hands of Mr. Kendall, the attorney of the company, I preferred to have Mr. Kirchoff go with me to Mr. Kendall's office and let him explain the reason why that foreclosure suit was going on. We went together to Mr. Kendall's office, and, as stated in my letter, Mr. Kendall was absent, and Mr. Kirchoff agreed to meet me at that office the same afternoon.

Q. You say that matter was in the hands of Mr. Kendall. What matter do you refer to?

96 A. I refer to the matter of the foreclosure of that as well as other loans. The foreclosure or matters pertaining to the foreclosure of loans were in charge of Mr. Kendall, the attorney, and I preferred that Mr. Kendall should explain to Mr. Kirchoff the reason for going on with that foreclosure suit.

Q. Do you mean the entire proceedings or simply the proceedings in court as an attorney?

A. I mean the proceedings in court, as attorney for the company.

Q. What conversation, if any, did you have with Mr. Kirchoff in your office at that time, before you went to Mr. Kendall's office? what did he say and what did you say in reply?

A. Mr. Kirchoff, as I recollect now, had been served with some notice to appear in this case, and he wished me to explain to him the reason for going on with the suit. As I stated before, he understood that the agreement between the insurance company and himself had put an end to any further proceedings in court, and I pre-

ferred to have Mr. Kendall explain his reasons for going on with the foreclosure suit.

Q. What did you say to him then and there about it?

A. I have already stated that I told Mr. Kirchoff that Mr. Kendall found that the title in the insurance company acquired by the quitclaim deed from the Kirchoffs was not satisfactory to Mr. Kendall, and that he decided to go on with the foreclosure suit in order to perfect the title. I think there were some judgments against the Kirchoffs.

Q. State whether or not this was before or after the receipt of the letter from the company in which the company advanced the price, apparently.

A. This interview with Kirchoff was some days prior to November 26, '79. I should have to refresh my recollection by reference to the letter you refer to as coming from the company.

Q. I call your attention to the letter of November 5th, 1879, from De Witt to you, and ask you whether or not after the receipt of that letter you did or did not go forward towards carrying out the contract with Mr. Kirchoff.

A. My letter to the insurance company dated November 26th, 1879, was written, in all probability, after the receipt of the letter from De Witt to me dated November 5th, '79. It appears from my letter that I proceeded to carry out that agreement between Mr. Kirchoff and the insurance company, so far as I was able to.

Q. Again calling your attention to the letter of November 26th, please state what you meant by the expression, "He claims that he settled with Mr. Kendall with the understanding that he was to purchase the homestead on the terms submitted some time since by Mr. Kendall." What do you refer to there?

A. As I recollect it now, Mr. Kirchoff went to Mr. Kendall to see if he could modify the agreement in respect to the first payment. The agreement was that Mr. Kirchoff was to pay one-tenth of the price on the delivery of the deed from the insurance company to him, and he asked Mr. Kendall to see if he could modify that payment, making it six months from the date of the deed, and I believe that Mr. Kirchoff understood from the conversation with Mr. Kendall that that was satisfactory to him, and Mr. Kirchoff stated to me that he had arranged that matter with Mr. Kendall. This is as I recollect it now.

Q. And where in said letter you state that Mr. Kendall said that such was not the case, what did you mean by that?

A. I meant by that that Mr. Kendall said that he had not changed the original agreement, but at Kirchoff's request had made a suggestion to the company.

Q. A suggestion favorable to Mr. Kirchoff in respect to his proposition?

A. Yes.

Q. Was there at the date of this letter of November 26th, 1879, anything further that Mr. Kirchoff was to do under his agreement which he had not already done?

A. I do not recollect of anything. I should say there was not.

Q. In your cross-examination when asked if you had ever applied for a writ of assistance you said you did not know. Have you any more distinct recollection on that subject now?

A. I have. I know that I did not.

Q. Please state whether or not at the date of the giving of the deed by Kirchoff to the company the agreement to which you have testified was complete or otherwise—that is to say, whether the terms of that agreement were definitely agreed to or not.

A. I understand that they were definitely agreed upon.

Q. Please state, if you have not already done so, what agreement, if any, was entered into between Kirchoff and the company through you relative to the effect of his taking a lease of part of the homestead property from the company on his agreement with the company for a reconveyance.

A. I have already stated that at the time Mr. Kirchoff signed the lease for the homestead that I stated to him that his rents would reduce the cost of the property under that agreement.

Q. Do you know how much, if anything, Mr. Kirchoff paid on that agreement?

A. I should have to refer to the records in the matter. I have forgotten how much.

Q. Can you approximate it?

A. I should think it would possibly be two or three hundred dollars; possibly more. I do not remember.

Q. Had you any general instructions from the company relative to disposing of property at certain rates or settling with mortgagors on certain terms by conveyance to them of mortgaged property? If so, please state the same.

A. I had general instructions from the insurance company in regard to the reduction of interest on all loans here in Chicago, and general instructions in regard to the sale of real estate as the price of the real estate as fixed by Mr. Rees and Mr. Morey, and the property was sold or offered for sale at the appraised value of these gentlemen. Sales were made by me and reported to the insurance company, as I recollect it now; also agreements to reduce the rate of interest from eight to six per cent. on condition that the borrowers pay one-tenth of the principal down and the balance in twenty semi-annual payments.

Q. And had you or not general instructions with reference to any or all property of the company here to that effect?

A. I had general instructions as to the sale of property and as to the reduction of interest, as I have stated.

Q. What, if any, instructions did you have from or conversations with Mr. Sharp, the vice-president, when he was here in regard to a settlement of this Kirchoff business?

Objected to as improper and incompetent.

A. Whenever Mr. Sharp was here and this matter came up it was talked over with him, and his instructions, if he had any, were carried out if it were possible to do so. I do not remember any particular instructions in this case from Mr. Sharp, although I presume

he was here on several occasions when the matter was under consideration.

Q. Was he or was he not fully advised of the situation of affairs whenever he was here?

A. He was fully advised whenever he was here.

Q. Please look at the letter of Mr. De Witt to Mr. Kendall, of August 3rd, 1877, in which he says: "At a meeting of the finance committee this morning we considered the matter of the Kirchoff loan, and we propose to let him have his own way about it, but get the time reduced to five years if you can. The reasons moving the finance committee in this matter are simply these: They deem this the easiest and quickest way to get title to the property," etc. Please state whether you ever saw that letter, and, if so, state whether or not the reasons given in that letter for letting Kirchoff have his own way influenced you to any extent in making your agreement with Kirchoff, and whether they subsisted at that time. Please explain fully.

A. I have no positive recollection of seeing the letter, but I believe I did see it from the fact that I am somewhat familiar with it. The reasons moving the finance committee at that time for letting Kirchoff have his own way subsisted at the time the agreement was made with Kirchoff, and as a matter of course these reasons had some influence in the matter.

Q. I call your attention to a portion of your cross-examination of June 13th, 1884, where you begin to answer a question and are interrupted by a further question, and you state that the rents which he paid on the homestead property would reduce his debt the amount of the rent he paid. Please explain what you meant by that answer.

A. I meant by that answer that the rents that were paid for the homestead by Kirchoff would be applied on the purchase of the homestead as per the agreement referred to.

Q. Were the instructions under which you acted for the company always in writing?

A. No, sir; they were not.

99 Q. Please state how they were given.

A. Instructions were received by letter or in person when the officers of the company were here or when I was at the company's office in Boston.

Q. Please give me an idea of the volume of the business transacted by you for the company—that is, the amount of business that was being attended to constantly—how many loans, if you can approximate it, were requiring attention at one time.

Objected to as misleading and immaterial.

A. I cannot state the number of different loans which required attention. I believe, however, that the amount of money loaned, which was directly under my charge here, amounted to between three and a half and four millions of dollars.

Q. And what was the average amount of the loans?

A. I don't know. To guess at it, I should say \$3,000; possibly

\$4,000. I may have put the average a little small; the number was up in the hundreds, but there were quite a good many small loans.

Question and answer objected to as immaterial.

Upon stipulation it is agreed that the answer of Julius Kirchoff to an application for a writ of assistance in the United States court and endorsements thereon, marked Exhibit Q, may be introduced in evidence as though it were the original, subject to all objections that might be made to the introduction of the original paper.

EDWIN A. WARFIELD.

Mr. GROSSCUP: We object, of course, to proving the authority of the agent by the declaration of the agent.

The COURT: He says he had it either by verbal instructions or written instructions from the officer; verbal instructions can be proved by parol.

Mr. GROSSCUP: Yes; but they are asking whether he had authority.

"Ex. Q."

Answer of Julius Kirchoff.

United States Circuit Court for the Northern District of Illinois.

UNION MUTUAL LIFE INSURANCE COMPANY	} In Chancery.
vs.	
JULIUS KIRCHOFF <i>et al.</i>	

The undersigned, in response to the order heretofore entered herein, upon the petition of James R. Page, requiring him to show cause why a writ of assistance should not issue in said cause directing the marshal to put the receiver in the above-entitled cause in possession of the property in the bill described, says that the
 100 issuance of such writ would be inequitable and unjust and calculated to prejudice the rights of the defendant Julius Kirchoff.

The undersigned begs leave to submit herewith the following statement of facts as grounds for resisting the application for said order:

Previous to the institution of any foreclosure proceedings in this case, an agreement was entered into between the complainant and said defendant, whereby for the consideration hereinafter named said defendant was to quitclaim to said complainant his interest in certain of the property described in the bill of complaint, including lots 2 and 4, in block 21, Canal Trustees' subdivision, in the west half of the southeast quarter of section 3, township 39, range 14 east, said last-described property being the homestead of said Kirchoff, and a lot near the same, in the vicinity of Rush and Pearsons streets, and was to consent to a foreclosure on all of the property described in said bill. On behalf of the complainant it was agreed and distinctly understood, with reference to the two pieces of property last de-

scribed, that the same should be bid off, at a sale to be made under the decree to be entered, at such sum as the complainant should see fit, and that after the same had been made said defendant, Kirchoff, should be entitled to a reconveyance of said two lots last above described upon payment to complainant of the sum of \$10,000—that is to say, said complainant was to convey said two parcels of property to defendant Kirchoff, or to such person as he should nominate, for a consideration of ten thousand dollars, in ten payments of one thousand each, one thousand to be paid upon the tender by complainant to said Kirchoff of a deed of said property within one year from the date of the master's deed to complainant under said decree, and the residue of the unpaid consideration of ten thousand was to be secured by a lien on the lots and made payable in nine equal payments of one thousand dollars each as aforesaid, and this respondent executed a quitclaim deed to said complainant in pursuance of said agreement.

The undersigned now avers that complainant, regardless of its duties and obligations in the premises and contrary to justice and equity, claims to own said property absolutely and refuses to convey the same to the undersigned in pursuance of said agreement.

The undersigned further states that according to the terms of said agreement no deficiency decree was to be entered, or, if entered, the same was to be cancelled without payment; that the undersigned is not indebted to said complainant in any sum whatever; that he has been willing and still is willing to faithfully fulfill his undertaking in the premises; that said property is worth a sum greatly in excess of ten thousand dollars, and that at the time of the foreclosure the property covered by the liens described in the bill was worth much more than all sums of money due from the undersigned to said complainant, and that he would not have executed said deed but for the agreement so made by said complainant to transfer to him the title to the said lots two and four upon the terms named.

Said Kirchoff further states that his solicitors have in
101 course of preparation a bill in chancery, setting up the foregoing facts and asking that complainant be required to execute its undertakings in the premises, or in default thereof that the decree herein be set aside and held for naught.

The undersigned further states that he has frequently offered to perform and has at all times been ready and willing to perform said contract upon his part by the payment of one thousand dollars and the proper securing of the balance of said sum of ten thousand dollars upon the execution and delivery to him by said complainant of a deed of said property, and he now here avers his readiness to perform said contract upon his part according to the terms of said agreement.

Inasmuch, therefore, as the complainant cannot be prejudiced by delay, your objector asks that no order of restitution be issued herein for a reasonable time at least.

JULIUS KIRCHOFF.

STATE OF ILLINOIS, } ss :
Cook County, }

Julius Kirchoff, being duly sworn, on oath deposes and says that he has read the foregoing instrument and knows the contents thereof, and that the allegations therein are true.

JULIUS KIRCHOFF.

Subscribed and sworn to before me this 16th day of November, 1881.

LOUIS DANZIGER,
Notary Public.

Filed in United States circuit court Nov. 16, 1881.

W. H. BRADLEY, *Clk.*

OCTOBER 7TH, 1884—10 a. m.

Present: W. S. Harbert, Esq., for plaintiff; Edward R. Swett, Esq., for defendants.

ROBERT B. KENDALL, a witness on behalf of complainant, sworn, was examined by Mr. Harbert, and testified as follows:

I am of lawful age and reside in the city of Chicago.

Q. Are you acquainted with the parties to this suit?

A. I am.

Q. Were you formerly in the employ of the defendants, The Union Mutual Life Insurance Company of Maine; if so, from when to when?

A. I was in their employ for several years; I think from 1875 to 1881.

Q. In what capacity?

A. As attorney-at-law.

Q. Where?

A. Part of the time in the city of Boston; for the most of the time in the city of Chicago. I was in their employ in the city of Chicago from the fall of '76 until some time in the winter of '81.

102 Q. As attorney and solicitor for the defendant company, what nature and class of business came within your purview?

A. Well, I was in charge of the making of collections of loans, foreclosing mortgages and trust deeds, and had sort of a general supervision over the titles of the company (or rather of the property owned and acquired by the company); had something to do with their sales, etc.; acted as general solicitor for them in all their legal matters here in Chicago and vicinity.

Question and answer objected to, as it does not appear that the appointment of Mr. Kendall was not in writing, and as not being the best evidence.

Q. Do you remember a loan of the company to Mrs. Kirchoff for about the sum of \$60,000?

A. I recollect there was such a loan on the books of the company during the time I was acting for them in that capacity.

Q. Please state the general nature of the loan, who made the papers, and what was covered, in general.

A. It was a loan made by the company to Mr. and Mrs. Kirchoff for \$60,000 in May, 1871—I think it was May, '71, the papers were dated—secured by a promissory note of Julius Kirchoff and Elizabeth Kirchoff, his wife, and Mrs. Angela Diversey, who was, as I understood, Mrs. Kirchoff's mother, and by a trust deed executed by the same persons to Levi D. Boone, as trustee, conveying a large amount of real estate in Chicago, located at different places, and also some property in the country, in the town of New Frier, situated on the lake shore, some miles north of Evanston.

Q. Was there ever more than one such loan to these parties?

A. There was not, to my knowledge.

Q. Please state in whom the title to this property securing this loan was, and, if it was in more than one person, please state in whom.

A. The title to the property in the country, in the town of New Frier, was in Mrs. Diversey. The title to most of the property in the city was in Mrs. Kirchoff, and I think there were some lots also included in the trust deed, the title to which was claimed by Mr. Kirchoff, but, as I recollect, that title failed. The most of the city property, if not all of it, was in Mrs. Kirchoff.

Q. Please state whether or not that loan was paid at its maturity.

A. It was not.

Q. Please state whether or not, to your knowledge, an arrangement was entered into between the company and Mrs. Kirchoff, through her husband, Mr. Kirchoff, concerning the property which had belonged to them or one of them, whereby for certain considerations a part of that property was to be transferred to them.'

Objected to as leading.

A. There was some arrangement of the sort entered into, as I understood.

Q. Please state the terms of any agreement between the 103 company and the Kirchoffs respecting the property covered by such trust deed; state the facts as nearly as you can in chronological order.

Q. Well, the loan being overdue and unpaid and a large arrearage of interest, taxes, etc., I was instructed, or, rather, in pursuance of my general instructions as attorney for the company, I commenced a foreclosure suit in the United States circuit court in July, 1878, to foreclose the trust deed. There had been some negotiations between the company and Mr. and Mrs. Kirchoff in regard to some terms of settlement, if possible, to avoid the foreclosure proceedings, but they did not seem to be able to carry out the terms talked of at that time, and I finally commenced this foreclosure suit. Mr. Kirchoff then made some arrangement through Mr. Warfield, I think, the financial agent of the company here at that

time, for redemption of his homestead, by which, I understood, it was agreed that he could redeem or repurchase from the company upon the payment of its appraised value, the price to be fixed by appraisers to be selected by the parties interested—that is, by the Kirchoffs and the insurance company. These negotiations were not conducted by me. I was only advised of them as they were going on by Mr. Warfield and by conversations with Mr. Kirchhoff. Shortly after the suit for foreclosure was commenced, in pursuance of that arrangement, Mr. James H. Rees was agreed upon as an appraiser of the property, and I went with Mr. Rees, Mr. Warfield, and Mr. Kirchhoff one day to visit the property; we visited all the city property, I think, and Mr. Rees appraised the value of it and I informed Mr. Kirchhoff, I recollect, of the amount of the appraisal that Mr. Rees put upon the homestead lots that he wished to redeem—one of which was \$7,000 and the other was \$2,500, as I recollect. Mr. Kirchhoff expressed his satisfaction with the price and said that he would undertake to pay that if the company would make him a title to the property and release him from any further liability on his note and trust deed, and there was a general understanding to that effect, that he could buy the property back upon those terms and upon the terms of payment that the company had made in many other cases with parties similarly situated—that is, upon partial payments, dividing the amount into ten equal yearly payments, spreading it over a period of years in that way, with a low rate of interest. I don't recollect exactly what it was; it may have been six per cent. or may be four, I don't remember.

Answer objected to on the ground that it appears that the agreement for the redemption of the property was made with Mr. Warfield, and that the witness has no personal knowledge of it; also on the ground that it has not been shown that either the witness or Mr. Warfield had authority to make such an agreement.

Q. Please state whether that agreement between the Kirchoffs and the company contemplated the making of a deed from the Kirchoffs to the company and how a title was to be given by the company to Mrs. Kirchhoff and how the deferred payments
104 were to be secured. Please state what you may know about the matter and any other facts that you may remember concerning it.

A. Well, I was present at several interviews between Kirchhoff and Warfield, and I suppose took part in the conversation in relation to the transaction. It was all talked over on that day we went to visit the property; that was the result arrived at, and it was thought at the time that Mr. and Mrs. Kirchhoff could execute their deed to the company of all the property belonging to them involved in the mortgage, and the company could convey to Mrs. Kirchhoff the homestead lots—the two lots in question—and thereby make a good title to them and take a mortgage back as security for the deferred payments. The matter seemed to hang fire for a good while from one cause and another, partly owing to press of other business and partly owing, I think, to Mr. Kirchhoff not being ready to make

the first payment, and I went on with the foreclosure, but did not press that very much, thinking that the matter might be settled up without going through the whole process of foreclosing it. The case was pending until some time in the fall of '79, when I was urged by Mr. Warfield and also by Mr. Kirchoff to prepare the necessary papers for carrying out this agreement, and I prepared a quitclaim deed from Mr. Kirchoff and his wife to the insurance company of the whole property covered by the trust deed, except that belonging to Mrs. Diversey, and also prepared a deed from the company to Mrs. Kirchoff of the homestead lot which is situated on the corner of Pearson and Rush streets. I think it is lot No. 2 in the subdivision. I gave the draft of the deed to Mr. Kirchoff to get it executed by his wife and himself, and I sent the quitclaim deed from the insurance company to Mrs. Kirchoff to the office of the company, in Boston, with a letter in relation to the execution of it. Mr. Kirchoff, at that time, however, wanted some modification of the terms of payment; he wanted the first payment, instead of being made cash upon delivery of the deed, to be postponed until the end of the year, and finally said that if it could be put off until the spring following he would make it then; that it would be much more convenient to him to have it payable at that time than upon the delivery of the deed; and I wrote to the company, stating that Mr. Kirchoff wished to make that modification of the original agreement. I recollect I told Mr. Kirchoff I did not think that the company would do any such thing, but to gratify him I wrote them, stating his wishes in the matter, and in due course of mail I received a reply from the company, in which they said they declined to accede to his request, and also informed me that they would require a larger proportion of the purchase-money to be paid in advance than had been talked of here. I do not recollect exactly what terms they said they should demand; my recollection is that they said they should require one-quarter in cash. Anyhow, they made a material change in the terms of payment, and I don't know but they changed the price of the property.

105 Answer objected to on the ground that it is not responsive; also to so much of it as refers to instruments in writing or any letters written or received by the witness, and also because it has not been shown that the witness had the authority to make such an arrangement as he has testified to.

Q. Please proceed to give the further facts relating to the transaction—what occurred and what was said and done.

A. After I gave Mr. Kirchoff the draft of the deed to be executed by himself and wife he retained it for a long time—several weeks, nearly two months, I think—before he brought it in to me executed and acknowledged. I did not prepare the deed from the company to Mrs. Kirchoff until after he had brought in their deed to the company. Upon his delivering the deed to me I then prepared a deed from the company to Mrs. Kirchoff, as I have before stated, and forwarded it to the company.

Q. At the time you forwarded the deed for the company to exe-

cute was it the purpose of the company to obtain title through the quitclaim deed from the Kirchoffs rather than through the foreclosure proceedings?

A. Yes; that was the purpose at that time. I had made a lot of judgment creditors parties defendant to the foreclosure proceeding, the abstracts of title showing a number of outstanding judgments against Mrs. Kirchoff, but Mr. Kirchoff assured me that those judgments had in fact all been settled. I then made an examination of the records of the courts and satisfied myself that the judgments had been settled and discharged of record since the abstracts had been made up, and therefore I saw no reason why the company could not settle the matter by taking a deed from the Kirchoffs and making a deed to Mrs. Kirchoff, taking her mortgage as security, as had been previously agreed upon; but about this time (I think just after I sent the deed to the office of the company) in re-examining the abstracts of title to this homestead lot I discovered that there was an outstanding title under an execution sale by the sheriff on a judgment some years before against Mrs. Kirchoff in favor of one Eben F. Runyan. The judgment had been recovered by him and the homestead had been sold under an execution and had been purchased by one Stanford, and I saw no way of making the title complete in the company except by going on with the foreclosure and having the property sold under a decree. I then amended my foreclosure bill by making Mr. Runyan and his assignee in bankruptcy, Robert E. Jenkins, and Mr. Stanford defendants.

Question and answer objected to as immaterial.

(Witness continuing :) Mr. Kirchoff, upon being served with the order of court making Runyan a defendant (Runyan being at that time a non-resident and having to be served in Nebraska, and the law requiring an order of that kind to be served upon the occupant of the property), came into my office and inquired what I was going on with a foreclosure for against his homestead, and claiming that

106 his understanding was that everything was to be settled up by the deed, and he was not to be troubled with any further proceedings in court. I explained to him the circumstances making it necessary to do this for the benefit of the title, and told him it would make no difference except in delaying the consummation of the arrangement with him; that it would be better for him, as well as for the company, that the foreclosure proceedings should be completed in order to cut out this intervening lien.

Q. The arrangement to which you have referred, as I understand it, related to what was termed the homestead lots. Please describe those lots.

A. The lot on the corner of Rush and Pearson streets was the lot on which the house stood, which was occupied by Mr. Kirchoff and his wife as a residence. Then there was another lot in the rear of that, fronting on Pine street, which was vacant. Mr. Kirchoff wanted to redeem the two lots together.

Q. The deed which you have referred to as prepared by you and

sent to the company to be executed, described, you have said, but one lot. Why did it not include both?

A. Well, I had some talk with Mr. Kirchhoff at the time about it, and I think I told him the corner lot there was as much as he was really able to take care of—pay for—and I think I tried to dissuade him from undertaking to buy back the two for that reason. More than that, I do not exactly recollect the reasons that induced me to make the deed for one lot only. I know I did prepare the deed for the corner lot on Rush and Pearson streets, which was his homestead.

Q. Did you afterwards attempt to dissuade him from redeeming both?

A. I don't recollect that I did after that. I probably thought that one at a time was as much as he had better undertake. I know he seemed to find it difficult to raise the necessary money to make his first payment, and I thought he might pay for one lot at that time easier than he could pay for the two.

Q. Did he ever, in fact, release or relinquish his claim upon the other lot?

A. No; I do not understand that he did give up his intention of buying back the other lot.

Q. What did you do with the deed from Kirchhoff and wife to the company?

A. I filed it for record in the recorder's office.

Q. Please state whether or not one or more of the officers of the company were here in person frequently during the period you have referred to.

A. Oh, yes; they were here frequently—the president and vice-president and some of the directors. One or the other of them was here a great deal of the time.

Q. Please state whether or not the officers of the company who were here—the president or the vice-president—were apprised of what was done towards the consummation of the agreement between the company and the Kirchhoffs to which you have referred.

107 A. I do not recollect—that is, I do not recollect of myself apprising them of the matter except by the letter I have mentioned. I may have written them on the subject and may not; I do not recollect.

Q. Please state whether or not it was your custom to apprise them when they came here of the condition of matters in your office.

A. Yes; it was.

Q. Also whether or not it was your custom to apprise them of the condition of any contracts in process of completion or execution.

A. I always reported on those that I had specially to do with personally when one or the other of the officers was here, or by correspondence. I used to make them a report every month of the work that I was doing at my office. My business, of course, related more to the legal department, foreclosure of the mortgages, etc., and not so much to the selling of the property—only incidentally. Mr. War-

field was the agent for negotiating with parties for sales and settlements, and I only had to do with that incidentally in connection with the legal part of the business.

Q. How was it with reference to this particular matter?

A. I don't recollect, more than I have stated in regard to my communications with the officers of the company.

Q. I now refer more particularly to your conversations with them while they were here, as to whether or not they were apprised of what you had done in the matter.

Objected to as leading.

A. I haven't any definite recollection on that subject. I did what I did in this matter, in drawing up this deed which I sent to the company, etc., in pursuance of advices which I received from Mr. Warfield; he was at that time urging a settlement of this Kirchoff matter upon me, rather pressing me to close the thing up, as far as I had to do with it.

Q. Did you make any arrangement or had you any conversation with Mr. or Mrs. Kirchoff in regard to their paying rent for the homestead property and having the amount of such rent credited on their redemption money?

Objected to as leading.

A. None.

Q. Do you recollect what authority you received and from whom, if any one, to go forward with the matter of closing the arrangement with the Kirchoffs after the receipt by you of the letter from the company declining the modification of the contract suggested by Mr. Kirchoff?

A. I do not recollect that I received any instructions from anybody to go on with the matter. I went on with the foreclosure matter, of course, incidental to my general business. I did not do anything after that time with reference to this agreement with the Kirchoffs for the repurchase of their property that I know of.

108 Q. Was it before or after the receipt of that letter that you received the deed from the Kirchoffs?

A. I received the deed from the Kirchoffs before I received this letter from the company. Mr. Kirchoff brought the deed in and delivered it to me, and thereupon I prepared the deed conveying the homestead lot to Mrs. Kirchoff.

Q. Where was Kirchoff living during these negotiations?

A. He was living in this house on the corner of Rush and Pearson streets.

Q. How far had the foreclosure progressed at the time your relations with the company terminated?

A. The property had been sold by a master in chancery and the sale had been confirmed.

Q. Do you remember the date of the sale by the master in chancery?

A. (Referring to a memorandum.) The sale by the master in chancery was on the 20th of October, 1880.

Q. When, then, could the company have given a good title to the homestead lots—when would the company have been entitled to a master's deed?

A. In 15 months from that date. That would be on the 20th of January, 1882. The master's deed was executed on the 21st of January, 1882.

Q. Had you authority to do whatever you did in or about the Kirchhoff loan?

A. I had.

Q. Who was the president of the company?

A. Mr. John E. De Witt.

Q. Who was the vice-president?

A. Mr. Daniel Sharp.

Q. What other officers or agents of the company ever visited the Chicago office?

A. Mr. Edward R. Seccomb, who was one of the directors of the company, was here frequently for several years. Other directors of the company occasionally visited Chicago.

Q. Who was Mr. Warfield?

A. Mr. Warfield was known as the financial agent of the company here in Chicago.

Q. As such, what were his duties?

Objected to as incompetent and on the ground that it had not been shown but that the appointment of Mr. Warfield was in writing.

A. The nature of Mr. Warfield's appointment, duties, and business here was to exercise a general supervision over the investments of the company here, collect the interest and principal of the loans, negotiate with parties for the sale of property that the company had acquired title to, and make himself generally useful in that capacity, I suppose.

Answer objected to for the same reasons as the preceeding.

109 Q. Did he so act?

A. That was the kind of business that Mr. Warfield did. He may be said to have so acted; he was very busy all the time over those matters.

Q. Please state whether you received more or less directions from these several officers of the company orally and acted thereon.

Objected to as leading.

A. Oh, yes; I received directions from them whenever they were here about various matters and acted upon them accordingly to the best of my ability.

Answer objected to as general and not referring to matters in controversy.

Q. How was it with reference to this particular matter?

A. Whatever I did in connection with this particular matter was done pursuant to my general or specific directions from the officers

of the company. Of course many things were necessarily left to my discretion.

Q. Where was your office at that time?

A. At 133 La Salle St., in what is known as the Boone block.

Q. In the same building with the offices of the company?

A. In the same building with the other offices of the company. The insurance agent was in there, and Mr. Warfield was in there, and I was in there; we were all there.

Q. State whether or not you and Mr. Warfield freely conversed with each other with regard to the business of the company, and particularly with regard to this Kirchoff business.

A. Yes; it was our habit to work together—to discuss matters of business pertaining to the company together—and act together as far as possible, and we did so in this particular matter with Mr. and Mrs. Kirchoff. We were in frequent consultation from time to time.

Q. Please state whether or not the officers of the company when here freely conversed with Mr. Warfield and yourself with regard to all the business of the company, including the Kirchoff matter.

A. The general business in our hands was always more or less talked over and discussed when the officers were here, and the matter of the Kirchoff loan was a great many times discussed in its various aspects by the officers of the company, the president, Mr. Warfield, and myself and the vice-president, too, I think.

Answer objected to as not referring to the particular agreement testified to by the witness.

Q. Was that also true with reference to the particular agreement you have testified to?

A. I think the subject of Mrs. Kirchoff's redemption or repurchase of that property had been talked over in my presence. I don't recollect any particular time or place, but I know it was a matter of general conversation. I think it was well understood by the president of the company and possibly by the other officers that

110 Kirchoff was to be allowed to buy back this homestead property. I know I understood that part of it as the settled understanding all around. There was a good deal of talk about it at different times. The matter hung fire for a long period from one cause and another, but I never understood that it was abandoned or given up until the receipt of that letter that I got from the company when I sent the deed down there. I prepared that deed in pursuance with what I understand was the arrangement.

Q. Did the company ever, to your knowledge, tender to Mr. Kirchoff any reconveyance of the property?

A. No, sir.

Q. Did they ever, to your knowledge, tender back the quitclaim deed before its record?

A. No, sir.

Q. Did Mr. Kirchoff decline to go forward with his part of the contract, to your knowledge?

A. No; I never understood that he declined to do it.

Q. Did the company, to your knowledge, ever tender any deed to Mr. Kirchoff of the homestead or any encumbrance back for him to sign?

A. No; never did.

Q. Has the company, to your knowledge, ever done anything towards complying with its part of the contract, except the receiving by it of the consideration which it was to receive?

A. I don't know that the company ever did anything about it.

Q. At that time did you say your relation with the company terminated?

A. Some time in the winter of 1881.

Q. State whether or not during 1880 and 1881 you had any conversations with Mr. Kirchoff; and, if so, what his attitude was with regard to the contract.

A. Well, I don't remember any conversation with reference to the matter with Mr. Kirchoff except at the time I amended the foreclosure bill by making Runyan and other parties, as I have already testified, and that was in 1880, I think early in the year (referring to memorandum). That amendment was made on the 17th of January, 1880.

Q. When was that with reference to the receipt of this letter to which you have referred?

A. It was subsequent; I think it was some time in the fall, I should say perhaps in October, that that letter was written; I don't remember, of course, the date of it, but I know it was in the fall of 1879, and I know I made this amendment in January, 1880.

Q. State whether or not at the time of making this amendment it was the intention of the company to carry out its agreement with Mr. Kirchoff for a reconveyance of the homestead.

Objected to as calling for a conclusion of the witness.

A. I don't know what the intention of the company was at that time, except as gathered from the letter which they wrote me, in which they declined to make the modification in the terms of payment that Mr. Kirchoff asked for.

111 Q. After the company declined to make the modification

Mr. Kirchoff asked for his accommodation, state whether or not he was still anxious and willing to go on with the contract.

A. He so expressed himself to me.

Q. Now, you have referred to a Mrs. Diversey being in some way connected with this loan. Please state what, if any, settlement was made with the Diverseys, and what, if any, connection it had with the settlement with the Kirchoffs.

A. I made an arrangement with Mrs. Diversey for a deed of a portion of the property owned by her, which was covered by the trust deed, but that had nothing to do with this Kirchoff matter. Mrs. Diversey set up some defense to the foreclosure proceedings, and for that reason and for some other reasons pertaining to the title of the land owned by her I made a sort of compromise settlement with her, allowing her to keep a portion of her land and make a deed of the rest of it to the company, with the understanding that

she should be released from any personal liability, but those negotiations were conducted entirely independent of Mr. Kirchhoff. I don't know that Mr. Kirchhoff was ever aware of the settlement made with Mrs. Diversey, although it was made nearly at the same time that I prepared the deed from him and his wife to the company, but the negotiations were conducted independently.

Q. They were simply simultaneous in point of time?

A. Yes, sir.

Adjourned until October 11th, 1884, at 9.15 a. m.

OCTOBER 11TH, 1884—11 a. m.

Parties met pursuant to adjournment.

Present on behalf of complainant, Mr. Harbert.

Direct examination by Mr. KENDALL continued:

Q. Why could not the company make a deed and take back a mortgage from Kirchhoff, as agreed?

A. I think I explained that matter in my testimony the other day; that I discovered there was a sheriff's title intervening which would affect any title that the company would acquire under a deed from the Kirchoffs, and that a foreclosure was necessary in order to cut out this intervening incumbrance.

Q. Would not this defect also affect the lien which the company was to receive back from the Kirchoffs?

A. It would necessarily.

Q. What was the attitude of the Kirchoffs during the period you have testified to—in fact, during all the time subsequent to the making of the contract—with reference to their willingness and ability to go forward with the contract?

A. Mr. Kirchhoff, whenever I talked with him on the subject of his buying back his homestead, always appeared to be anxious to do so, and always claimed that he had the right to do so by virtue of the arrangement entered into with the company.

112 Q. State whether or not Mr. Kirchhoff seemed to regard the retention of the homestead as a matter of more importance than the company, by its agents, seemed to consider it.

A. I do not know that I am able to make a comparison of the degrees of interest felt in the transaction; still, Mr. Kirchhoff always displayed a good deal of anxiety for the redemption of his homestead property. I do not recollect that there was any special anxiety on the part of the company to sell it to him, but I know I was frequently urged by Mr. Warfield to have the transaction closed.

Q. In the arrangement between the company and the Kirchoffs the company was to receive its full appraised value, was it not?

A. The understanding, as I recollect, was that the company should receive the value put upon the property by the appraiser agreed upon by both parties, and they agreed upon Mr. James H. Rees. Mr. Warfield suggested the name of Mr. Rees, and Mr. Kirchhoff said that he would be satisfactory to him, and Mr. Rees accordingly appraised the property at the values I have heretofore stated.

Q. State whether or not the company parted with any other consideration for the quitclaim deed which it received from the Kirchoffs than a settlement of the claim under the mortgage and the right to the Kirchoffs to purchase the property at its appraised value, giving them the time to pay for it which you have named.

A. Not that I am aware of.

Q. Had the Kirchoffs any other real estate that you know of besides that included in the trust deed?

A. They had no other that I could discover.

Q. Did the company, to your knowledge, through any of its officers or agents ever tender to the Kirchoffs or either of them a deed of the homestead lots and request the payment of the money agreed to be paid and the making and delivery of any lien covering the deferred payments as agreed?

A. No.

Q. Did you ever inform the Kirchoffs or either of them that the company declined to carry out the agreement concerning the homestead property?

A. Not that I recollect.

Q. You have said that you prepared a deed for the company to execute covering but one lot, and I inquired of you as to why the other lot was not included. Let me refresh your recollection by asking you whether Kirchhoff about this time was not endeavoring to sell the other lot to Isham and Prentice or some one through them and whether Kirchhoff did not request that the deed to the other lot be temporarily withheld until it should be determined to whom he would have the deed made.

A. I do not recollect any such request on the part of Mr. Kirchhoff. I recollect that an offer had been made by Mr. Isham for the purchase of the Pine Street lot. I was informed of this by Mr. Warfield, and I recollect Mr. Warfield saying that he had some talk with Kirchhoff in reference to it. I remember that the offer of Mr.

113 Isham was \$3,000 at one time for that lot, but I do not recollect that that matter influenced me in preparing the deed for one lot only, and I do not recollect Mr. Kirchhoff making any request of that nature.

Q. State whether or not these propositions of Mr. Isham occurred about this time and whether that might not have been the influencing cause.

A. I do not recollect as — the time of this negotiation with Isham whether it was about that date or not. My impression is that it was a considerable time before then, but I have no definite recollection as to the time of Isham's offer except that it was some time prior to the time I prepared that deed and sent it to the company.

Q'n. I believe you said that Mr. Kirchhoff was consulted about such offer?

A. I understand from Mr. Warfield that he had talked over the matter with Kirchhoff.

Adjourned.

KIRCHOFF }
 vs. }
 U. M. Ins. Co. }

NOVEMBER 14, 1884.

Parties met pursuant to agreement. In the absence of Mr. Harbert, solicitor for plaintiff, Mr. Edward R. Swett, who appeared on behalf of defendants, agreed that Mr. Harbert might make hereafter objections to any of the questions and answers the same as though he had been present and made them upon this examination.

Cross-examination of ROBERT B. KENDALL by Mr. SWETT:

Q. When did the term of your employment by the Union Mutual Life Insurance Company in Chicago commence and when did it cease?

A. I stated in my direct examination that I came here on business with the insurance company in the fall of 1876, and that I finished my labors some time in the winter of 1881.

Q. What was the scope of that employment?

A. I was employed as general solicitor and attorney for the company in connection with their business matters in Chicago and other places in the West; chiefly in Chicago, however.

Q. What were your duties in relation to the real estate of the company? How far did your authority extend?

A. Do you mean the real estate owned by the company?

Q. The real estate owned or upon which the company held mortgages.

A. My authority was the same as that of any attorney who had business put into his hands, I suppose. I had charge of the foreclosure of their mortgages especially.

Q. The company had a financial agent here in Chicago, did they not?

A. It had.

Q. Were you authorized, for instance, to make a sale of real
 114 estate without referring the matter to the company for their approval?

A. No, sir; I had no such authority as that.

Q. Or to compromise a case pending for the foreclosure of a mortgage without the consent of the company?

A. I never exercised any such authority without referring to the company.

Q. In all such matters, then, did you act under the instructions of the company, either oral or written?

A. I acted under either general instructions or what I considered general instructions by virtue of my position in connection with the company and any special instructions that I received from them from time to time. Of course there were always matters of detail that I was authorized to act upon without referring to the company or anybody else or anybody representing the company.

Q. Would those general instructions to which you refer authorize

you to compromise a pending foreclosure suit without getting the full value of the foreclosure, or to make a sale of a piece of real estate without consulting the company?

A. No; I do not understand that my authority extended so far as that and I never presumed to exercise it.

Q. Were you in the habit of reporting, either by letter or by written reports, to the company all of the transactions made by you as their attorney?

A. Yes; I was substantially—that is, all the important transactions and a great many of the details of business I reported from time to time so as to keep them posted as to how matters were progressing or stagnating, as the case might be.

Q. How often did you make written reports to the company aside from the letters?

A. During a portion of my administration of that office I was in the habit of making regular monthly reports, I think, for the larger part of the time, perhaps; I don't know when I commenced that system.

Q. Were those reports supposed to cover all of the transactions in regard to the various pieces of property belonging to the company or upon which they held mortgages in Chicago?

A. No; they were designed to keep the company advised of what I was doing.

Q. If you had made any important negotiation or agreement in regard to a certain piece of property would the result of that negotiation or agreement have appeared in such report?

A. Most likely it would, unless I accidentally overlooked it.

Q. If it had not appeared in a report would it have appeared in the correspondence with the company?

A. It would be very likely to appear in one or the other or both.

Q. On your direct examination you have testified to an agreement in regard to the property in question. Where was that agreement made and when, as near as you can recollect?

115 A. I don't know.

Q. Was the agreement made with Mr. Kirchoff by you personally?

A. No; I did not make any agreement with Mr. Kirchoff personally.

Q. You made no agreement whatever in regard to his being allowed to purchase the "homestead" from the company?

A. No.

Q. Were you present when such an agreement was made with him?

A. I don't know that I was present when any such agreement was made originally. I was present on several occasions when the matter was referred to in conversation with Kirchoff and Mr. Warfield, and in which conversations I may have taken part, more or less—that is, it was referred to as an agreement that existed. I cannot recollect any particular time or times when I was present except at the time when I went with Mr. Kirchoff, Mr. Warfield, and Mr.

Rees to view the property for the purpose of appraising it. At that time I understood that the visit to the property was made pursuant to an understanding arrived at between Warfield and Kirchoff, that Kirchoff should have the opportunity of taking this property in the way already stated, at its appraised value, and I recollect that after our visit to the property and after Mr. Rees had reported in writing and had given me his report of the values of the different pieces of property I informed Mr. Kirchoff, who called at my office, of the price put upon the property, and he signified at that time his satisfaction with the price and with the arrangement in regard to the purchase of it.

Q. Had foreclosure proceedings been begun at that time?

A. Yes; they had, I think. My recollection is that this appraisal took place shortly after the foreclosure proceedings were commenced, and I think the commencement of the foreclosure proceedings probably stimulated Mr. Kirchoff to come to some understanding. I know the matter had been talked with him off and on before, and I did not know whether any definite result had been arrived at or not. I know it was a matter of frequent conversation.

Q. How much was involved in this loan?

A. The original loan was \$60,000; there had been very little paid on it.

Q. Was it a matter upon which the company were anxious and upon which a good deal of correspondence passed between yourself and the company?

A. Well, it was a matter about which they were very much interested, perhaps "anxious" in a certain sense, and I do not recollect as to the amount of correspondence I may have had with the company in reference to it; probably there was considerable.

Q. Did the company authorize this agreement to which you have referred; and, if so, in what way?

A. I don't know.

116 Q. Have you any memoranda of any kind upon which you make this testimony, or is it merely a matter of memory?

A. I have no memoranda of any kind in my possession, except some notes I made from the foreclosure proceedings from the files in court by which I refreshed my memory a little in regard to the dates of the proceedings in court.

Q. Over how long a period did these negotiations extend in reference to the settlement of this loan?

A. I think negotiations were opened with Kirchoff as early as the fall of 1876, soon after I came to Chicago.

Q. Is it not true that Kirchoff was very frequently in your office talking with either yourself or Mr. Warfield about it?

A. No; I don't think he was frequently in the office. I know he came to the office several times, but he was not a frequent visitor; in fact, I think Mr. Warfield used oftener to run after him.

Q. Do you know of your own knowledge of this agreement that Kirchoff should be allowed to redeem the homestead ever having been brought by letter or orally to any officer of the company?

A. I have no recollection now of its having been brought to their

knowledge by any letter, except, possibly, in a letter that I wrote at the time I sent a draft of a deed from the company to Mrs. Kirchoff.

Q. Was there originally a proposition made to Kirchoff to extend the loan for a period of years preceding the agreement that you have testified to?

A. Yes; there was such a proposition, and I think it went so far as the preparation of the papers carrying it out; that was the first proposition that was talked over, and I think that contemplated Kirchoff's making new papers to secure the entire indebtedness and giving him a long term of years in which to pay it at a low rate of interest; but that was never carried out, and my understanding was that Kirchoff did not feel able to undertake it and it was dropped.

Q. Look at the letter I hand you and state whether that was received by you in due course of mail. (Hands paper to witness.)

A. I cannot say whether that is a letter received by me in due course of mail or not.

Q. Do you know the handwriting?

A. Yes; I recognize the handwriting.

Q. Was the letter written by some one in the employ of the Union Mutual Life Insurance Company?

A. The letter appears to have been written by the stenographer in the company's office in Boston at that time, and it is addressed to me.

Q. Do you remember having received a letter to that effect?

A. Well, not very distinctly. I probably did receive it. I have not a very clear recollection of the matter, though.

Defendant's solicitor introduces said letter in evidence, marked Exhibit A, Kendall's examination. The letter reads as follows:

117 "UNION MUTUAL LIFE INSURANCE COMPANY,
BOSTON, Aug. 3d, 1877.

R. B. Kendall, Esq.

DEAR SIR: At a meeting of the finance committee this morning we considered the matter of the Kirchoff loan, and we propose to let him have his own way about it, but get the time reduced to five years, if you can.

The reasons moving the finance committee in this matter are simply these: That they deem this the easiest and quickest way to get title to the property; that if we have to go into court to correct the defect in the title affecting the larger part of the loan it would injure the credit of the Co. a great deal more than to allow this money to remain at five per cent. for so long a time, even if they pay the interest. Certainly if they do not pay the interest we will have perfected title in the easiest way possible for us.

Yours truly,
(Signed)

JNO. E. DE WITT, *Pres't.*"

Q. Was there any one besides Kirchoff and wife liable on this \$60,000 loan?

A. Mrs. Angela Diversey's name was signed to the note for the \$60,000.

Q. Did you ever enter up a judgment against her for the entire amount?

A. I think I did—I know I did.

Q. What relation was Mrs. Diversey to Kirchoff?

A. Mrs. Diversey was, as I understood, the mother of Mrs. Kirchoff.

Q. Was not one desire, as expressed by Mr. Kirchoff in making the settlement to which you have testified, giving the quitclaim deed of himself and wife, that his mother-in-law might be released from her obligation?

A. No; I think not. I do not recollect of Mr. Kirchoff ever expressing himself in any such way as that.

Q. Was a settlement ever made with Mrs. Diversey by which she was released from liability; and, if so, what was that settlement?

A. There was a settlement made with Mrs. Diversey in this way: The company allowed her to keep a portion of her land which was included in the trust deed discharged of the incumbrance, and she quitclaimed the remainder of the land to the company in satisfaction of her liability. That was, in brief, the settlement made with Mrs. Diversey.

Q. Did Mr. Kirchoff enter into those negotiations in any manner whatever?

A. I don't remember that he did. I think those negotiations were conducted without reference to the Kirchoffs; independently with Mrs. Diversey, through her representatives. I never met her personally.

Q. Look at the book I now hand you, marked as containing letters from August 27th, 1877, to January 2nd, 1878, and especially at the letter on page 121, dated September 18th, 1877, and state in whose handwriting it is and what it appears to be.

A. The letter appears to be in my handwriting.

Q. Is that a letter-press copy of an original letter written by you?

A. It is.

Mr. Swett read letter as follows:

“UNION MUTUAL LIFE INSURANCE COMPANY,
September 18th, 1877.

Union Mutual Life Ins. Co., Boston, Mass.:

We found so many diverse and adverse interests in the Kirchoff case that it has been impossible to so harmonize them as to effect a settlement on the basis proposed by the president when here. Son-in-law Weckler has advised mother-in-law Diversey not to make herself liable a second time for her son-in-law Kirchoff; hence she declined to do more than sign a \$10,000 note, secured by a trust deed on her farm. This did not seem to Mr. Warfield and myself a sufficient inducement to release her from her liability for over

\$75,000 on the note we now hold, upon which we could enter up a judgment any day which would be a valid lien upon the farm, whether our trust deed is so or not. Mrs. Diversey acts under the advice of Weckler, and Kirchhoff has no influence with her whatever.

We had an interview yesterday with Weckler, at which he said that a \$10,000 mortgage on the farm and her release from any further liability was their ultimatum; but when I told him that in that case we should enter up judgment against Mrs. Diversey on our note we thought he exhibited some signs of weakening. He began to refer to a suggestion of mine made some time ago for a \$15,000 loan on the farm. I think they would give it. I think they are anxious to get Mrs. Diversey released from her liability on the old note, and I suspected from his manner that he did not know until then that we held her judgment note. He told us of some other land she owned, which he said was unincumbered, lying near the farm. After having alluded to the matter of taking judgment against her, we thought it best to clinch the matter by entering it up at once, and I accordingly entered up a judgment against Mrs. Diversey alone for the sum of \$75,696.89, principal and interest due, and also for fees and costs, and ordered an execution.

Kirchhoff has been through bankruptcy since he gave us that note, and, although he has not got his discharge, I see from an examination of the case that his discharge was applied for long ago, and that the register reported in favor of it, and there was no opposition. It would therefore seem that he can get it any day. He is probably unwilling to settle the costs. At the time the note was signed Mrs. Kirchhoff had no capacity to make a contract except as to her separate estate on account of her coverture, and I do not think
119 a judgment *vs.* her would hold. Married women were at that time in this State still under the common-law disabilities as to making contracts (except as I have mentioned). Her trust deed executed with her husband would probably be good, but her note, not being a contract relative to her separate estate, would not be worth a cent. Therefore I thought it best to take judgment against the widow Diversey alone. I think it very likely that the parties will now come to time upon almost any reasonable basis. I infer so chiefly from Weckler's manner when I mentioned the judgment to him yesterday. At any rate we have a pretty solid lien upon the farm and upon any other real estate of Mrs. Diversey.

Very respectfully, etc.,

ROBERT B. KENDALL."

Q. Now, up to that time had there been any such agreement made for the quitclaiming by Kirchhoff and wife of this entire property embraced in the trust deed and for their redeeming the homestead, as you have testified to?

A. I think not at that time. The matters alluded to in this letter relate to the negotiations that I have before mentioned for the giving of new mortgage papers for the entire indebtedness.

Q. Look at the report I now hand you, dated November 25th, 1878, and state what it is.

A. This is one of my monthly reports rendered to the company.

Q. Look at the next to the last page of this report, commencing with the last paragraph, and read the remaining portion of the report.

A. (Witness reads:) "I have had several interviews with Kirchoff relative to loan No. 682, hoping that we might effect a settlement of the matter without the delay of a chancery foreclosure. He would like to redeem his homestead and the adjoining lot and also the Diversey farm and surrender the rest; but Mrs. Diversey, his mother-in-law, who owns the farm, is under the influence of another son-in-law, Weckler, who is somewhat hostile to Kirchoff and I think advises the old lady not to agree to it. I think Mr. Kirchoff would give \$25,000, long time, at four per cent., with ten per cent. of principal annually, for the homestead and farm; the first valued at \$10,000 (two lots) by Rees and the farm at \$20,000 by Rees, which Mr. Warfield thinks is too high. He offers \$20,000, but I have told him I won't forward an offer for less than \$25,000, and would not assure him of the acceptance of even that. This arrangement has in view the releasing of an old trust deed prior to ours, of which you are informed, and the correction of the description in deed of the farm and deed of all the other property covered by the trust deed on their part and cancellation of the indebtedness and of the judgment against Mrs. Diversey on our part. What would be the views of the company in this regard, providing it can be done?"

Q. In whose handwriting is what you have read?

A. In my handwriting.

120 Q. Had any agreement such as you have testified to been made at the date of this report?

A. Well, so far as I have any knowledge of the agreement referred to in reference to the homestead property, so called, the two lots—I think it had been agreed upon before this date—that is, the redemption of the homestead lots for the appraised value placed on them—because I am very sure that it was prior to this date that the appraisal was made at the time I visited the property with the other gentlemen.

Q. Look at the book I now hand you, marked June 29th, '78, to April 25th, '79, and especially at a letter dated January 1st, '79, found at page 443, and state what it purports to be. (Hands same to witness.)

A. This is a letter-press copy of a letter written by me to the Union Mutual Life Insurance Company, dated January 1st, 1879, and is in my handwriting.

Q. There are some portions of this letter that do not refer to the property in question. I will ask you to read, commencing with the paragraph at about the middle of page 444, which is a part of this letter.

A. (Witness reads:) "There has not been much delay in the Kirchoff case, except that Mr. Barber, counsel for Diversey, was running for Congress, and I was obliged as a matter of courtesy to grant him a little extra time in which to prepare and file his an-

swer; that, however, has been done, and the case is at issue and will be referred to a master to take proofs and report. (Witness says that the next few words are illegible.) If the case then develops great difficulty, I will retain Mr. Sleeper, but *it* in its present state it seems unnecessary. I had hopes of effecting an amicable settlement and avoid litigation, but have not got such terms from Diversey as to care to submit them. The son-in-law of Mrs. Diversey, Weckler, says that it is with her a question of saving something from the property she pledged for Kirchoff's debt, and that if we are not willing to concede anything she will fight for what she can get. I think now that an offer on our part to let her keep forty acres of that farm would induce her to give us a deed of the rest, although she has not said so. Weckler, with whom I have had several interviews during the last month, offered on her behalf to divide the farm, which contains 130 acres. You are, I think, sufficiently informed of the various complications in this matter, so that I need not state them fully. I explained them fully to Mr. Sharp and have written fully to the company. I think we can maintain our case in court, but we may have a long — (witness states that the next word is illegible) of it. Kirchoff would willingly surrender all his property and make an arrangement to buy back his homestead at a liberal price, but I do not dare to settle with him without settling the whole case, as it might prejudice our claim against Diversey. It — (witness says next word is illegible) rather unfortunate now that we released part of the security without adequate consideration, thus leaving more than a fair proportion to be satisfied out of the remainder, and we cannot
 121 safely take Kirchoff's property for a certain part of the debt and then hold Mrs. Diversey for the bal.; it would give cause for complaint on her part, and our idea of the relative value of the different parcels of land might not be sustained by the court —. (Witness says next word is illegible.) A receiver of the property has been appointed and the rents will be collected by him. Kirchoff has taken a lease of his house from the receiver. I wrote in my report for November about this case, and the matter was referred to the vice-president, then here, but he did not appear to favor a settlement involving concessions (witness says next word is illegible) on our part. Of course, any settlement would involve some concessions on both sides. If it is not thought advisable to negotiate, I will give no further thought to the subject, but will push the court proceedings as fast as may be, but I would like an expression (witness says the following is illegible) of your views in the matter." That appears to be all of the letter relating to the Kirchoff business.

Q. Had the agreement with Kirchoff to allow him to buy back the homestead been made at the writing of the letter which you have just read?

A. Well, so far as I know anything about the agreement, it had been made previous to that date—that is, the understanding between the company and Kirchoff to the effect that he could have his homestead property at such a price. The way in which the

matter should be settled up so that could be brought about and completed does not appear to have been settled upon, but was still a matter for discussion and consideration.

Q. There had been at this time no completed agreement, although there may have been conversation in regard to an agreement?

A. My understanding was that it had been agreed that Mr. Kirchoff or Mrs. Kirchoff should in some way redeem their homestead upon paying the appraised value.

Q. About when was this appraisal made, as near as you can remember?

A. As near as I can recollect, the appraisal was made in July or August, 1878.

Q. Look at the letter I now hand you, dated January 8th, 1879, and state what it purports to be. (Hands paper to witness.)

A. This purports to be a letter in the handwriting of Daniel Sharp, who was at that time vice-president of the Union Mutual Life Insurance Company, bears date the 8th of January, 1879, is addressed to me, and is in the handwriting of Mr. Sharp.

Q. I will ask you whether this letter is in reply to the one you have just read.

A. This letter commences with the words, "Your favor of the 1st inst., responding to ours of 20th Dec., duly received."

Q. The first paragraph of this letter evidently refer to another case. Will you read such portions of the letter as refer to the property in question?

A. Omitting the first paragraph of the letter, which refers
122 to another matter, after acknowledging receipt of my letter of the 1st, the letter goes on to say as follows:

"In the matter of the Kirchoff case, if a settlement can be made which shall include Mrs. Diversey's suit and complications of every name and nature and attending costs by Mrs. Diversey retaining the forty acres the other side of the railroad tract (sic), as shown by you to the writer, with all needful quitclaim deeds from parties in interest, so that our title will be unquestioned to the whole property which we shall then hold, we will consent to let her keep the forty acres rather than prolong the case in court. If, however, she declines, we wish you to push the matter, as before advised.

Yours truly,

DAVID SHARP, *V. Pres.*"

There is a memorandum on the margin of this letter in my handwriting, saying, "Ans'd Jan. 14, '79."

Q. Look at the letter book I now hand you, marked June 29th, '78, to April 25th, '79, on page 483, and state what it purports to show.

A. This is a letter-press copy of a letter in my handwriting, addressed to the Union Mutual Life Insurance Company, dated January 14th, 1879. A portion of the letter refers to the Kirchoff business, and appears to be a reply to the letter I have just read from.

Q. Will you please read such portions of that letter as pertain to the Kirchhoff loan?

A. (Witness reads as follows:)

"I have Vice-President Sharp's favor of the 8th instant, and in reply—

In regard to settlement of the Kirchhoff case, do I understand the vice-president to refer to the suit now pending in the Supreme Court, this case, *Johnson vs. Diversey*, when he speaks of Mrs. Diversey's suit? If so, I have to say that a settlement such as suggested cannot be made to cover that case, although it would cover everything else. We cannot make Johnson a party to our settlement. That suit, however, does not affect the title to the Diversey farm, which was the separate property of Mrs. Diversey, but does affect the title to all the other land in the trust deed, which was Mr. Diversey's, the suit being against his administrator. There is a large amount of other property affected by that suit. Mrs. Kirchhoff's share was one-fourth, I believe. If the suit is finally decided in favor of the plaintiff, the claim becomes a lien upon the whole estate.

Very respectfully, etc., ROBERT B. KENDALL."

12.50 p. m.—Adjourned until 2 p. m. this day.

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NOVEMBER 14TH, 1884—2.30 p. m.

Parties met pursuant to adjournment.

Cross-examination of Mr. KENDALL continued:

Q. Look at the report I now hand you, dated June 30th, 1879, on page 7 of the same, and state what it purports to be.

A. I find in this report made by me to the company of that date an entry relative to the Kirchhoff-Diversey loan, in which it says, "June 9th, prepared quitclaim deed from Angela Diversey to the company of certain premises described here; prepared release deed from L. B. Boone to Angela Diversey of certain premises described; prepared quitclaim deed from Julius Kirchhoff and Elizabeth Kirchhoff to the company of all other land not released described in trust deed No. 682, both deeds of quitclaim made in satisfaction of indebtedness."

Q. Do you find anything in that report in relation to the agreement testified to for the redemption of the Kirchhoff homestead?

A. No; I find no reference to it.

Q. Look at the report I now hand you, dated September 30th, 1879, more particularly on page 2 of the same, and state what it purports to be.

A. I find in this report made by myself of that date to the company certain entries showing that on the 11th of September, '79, I received from Angela Diversey deed of a portion of her land described in the trust deed held as security for the loan; that I delivered to Mrs. Diversey a release deed from Dr. Boone of a portion of her land covered by the trust deed; that I had received from Julius Kirchhoff and wife a quitclaim deed of all the remainder of the lots

in trust deed No. 682, and that on the 12th of September I had recorded the warranty deed from Angela Diversey to the company.

Q. Do you find anything in that report about an agreement to redeem the homestead?

A. I do not see any reference to it here.

Q. Look at the letter book I now hand you, marked April 26th, '79, to February 28th, 1880, and especially on page 412, and state what it purports to be.

A. This is a press copy of a letter written by me to the insurance company, dated November 1st, 1879.

Q. Is it in your handwriting?

A. It is in my handwriting.

Q. Will you please read that letter?

A. (Witness reads:)

"CHICAGO, ILL., November 1st, 1879.

Union Mutual Life Insurance Company:

Among the lot of deeds forwarded from this office today for execution by the company is one to Kirchoff of his homestead lot, so called, which bears even date with the quitclaim deed given by Kirchoff and wife to the company. There was an understanding between Mr. Warfield, Kirchoff, and myself that the company would sell this lot back to him and allow him to pay for it in installments; but so far as I know the price was not definitely fixed. The consideration named in the deed I have prepared is the appraised value by Rees at the time he visited all the Kirchoff property, over a year ago. If the company approve of selling to him at that price, please execute and return the deed and name terms of payment. Kirchoff has expressed a preference for semi-annual payments ac. principal, but has always objected to paying anything down in cash, and I have always told him that the company would not like to sell without a payment in cash on delivery of the deed, so that is an open question as well as the price. He has never been near me since he delivered the quitclaim deed; but Mr. Warfield says that he claims now that he was to have the privilege of buying back lot 4 also (Pine St.); but such has not been assented to by me in any way, for I have thought that the redemption of his house and lot was as much as he ought to undertake. In all my conversations with Kirchoff I have avoided fixing the price, but have told him what Reese's valuation was and said I would advise the company, to reconvey at that price, and I do so advise accordingly. In the first instance he said he would be willing, in order to make a settlement and get rid of his obligation to the company, to undertake the redemption of his homestead at even more than it was worth. He now wants to include the lot on Pine street, making the total consideration \$10,000. (So says E. A. W.) I don't think we are — (witness says next word is illegible) any obligation as to lot 4, even morally; and, as I understand it, we are under no obligation whatever as to his homestead except to give him a chance to buy it back on such terms as the company are

offering other property—that is, long-time installments, low rate of interest. I don't believe he will pay any cash down, but think he will undertake to make a payment of $\frac{1}{2}\%$ on the first of April next. I would suggest making him such terms, with interest from date of deed, and then have him either accept or decline, and end it.

Very respectfully,

ROBERT B. KENDALL."

In the margin is written: Lot 4 is in demand, and Kirchoff knows there is money in it at the appraised value or at the offer made by Isham some time ago (\$3,000).

Q. That letter was sent by you to the insurance company, was it?

A. It was.

Q. Look at the letter I now hand you, dated November 5th, 1879, and state whether it purports to be an answer to the letter just read.

A. This is a letter which purports to be in reply to the letter I have just read; it is dated November 5th, 1879.

Q. By whom is it signed?

A. John E. De Witt, president.

Q. Do you know his handwriting?

A. Yes; I do.

Q. Is that his signature?

A. Yes; it is.

125 Q. Will you please read that?

A. (Witness read:)

BOSTON, November 5, 1879.

Robert B. Kendall, Esq., Chicago, Ill.

DEAR SIR: Your favor of the 1st is at hand and submitted to our finance committee yesterday at their regular meeting. They declined to sell the property mentioned to Mr. Kirchoff or anybody else for \$7,000. They will at any time within the next 30 days sell it to Mrs. Kirchoff on the following terms and conditions: For \$8,400, one-quarter cash, balance to be paid in 20 equal semi-annual payments, interest at six per cent. per annum.

The committee feel, in dealing with a man who has so little regard for his promise to pay, together with the fact that there is a 15 mos.' equity of redemption in your State—they feel that they must have a considerable margin of the amount down. They would not sell to anybody without a payment down. They would not sell the other lot to Mr. or Mrs. Kirchoff except for cash and at a price to be named, if they want it.

Yours truly,

JOHN E. DE WITT, *Pres't.*

Q. Look at the book marked April 26th, '79, to February 28th, '80, at page 440, and state what it purports to show. (Hands same to witness.)

A. This appears to be a press copy of a letter in my handwriting addressed to the insurance company, dated November 8th, 1879, in reply to the letter I have just read.

Q. Please read the letter.

A. The letter is as follows :

" CHICAGO, ILL., Nov. 8th, 1879.

Union Mutual Life Ins. Co., Boston, Mass. :

I have the president's favor of the 5th relative to the draft of deed sent by me to the company on the 21st ult. for conveyance of Kirchoff homestead lot to Mrs. Kirchoff for \$7,000, etc. I have communicated the company's decision to Kirchoff. Perhaps the finance committee did well to disregard my advice. I don't think Kirchoff will purchase, but perhaps he will.

Very truly,

ROBERT B. KENDALL."

Q. Did you communicate the decision of the company to Mr. Kirchoff?

A. I don't recollect whether I did or not. I don't think that I communicated it in writing, but whether I saw Kirchoff in regard to it or not I don't recollect now.

Q. Did Kirchoff ever express himself to you as willing to accept the offer of the company made in their letter to you of November 5th, 1879?

A. No; not that I recollect.

Q. Look at the report I now hand you, dated December 31st, 1879, and state whether it is one of your monthly reports to the company.

126 A. This appears to be one of the monthly reports.

Q. Is it signed by you?

A. It is signed by me.

Q. Look on page 3 of this report and read the first paragraph.

A. The first paragraph on page 3 of this report, under the title "Kirchoff," reads:

" November 8th. Filed for record deed from Kirchoff and wife to company. Received a letter from company in reply to mine of 31st October saying finance committee decline to sell Kirchoff his homestead for \$7,000, but will sell for \$8,400, one-quarter cash, balance in 20 equal payments, 6 per cent. interest.

November 17th. Received letter from company saying this matter must be fixed up before the end of the year.

December 1. Sent company a quitclaim deed from Kirchoff and wife to company."

Q. Look at the quitclaim deed I now hand you and state whether it is the deed executed by Kirchoff and wife to which you have referred in your testimony. (Hands same to witness.)

A. This is the deed from Kirchoff and wife to the insurance company to which reference has been made in my testimony.

Said deed offered in evidence by defendant's solicitor, marked Exhibit D, Kendall's testimony. It reads as follows :

This indenture witnesseth, that the grantors, Julius Kirchoff and Elizabeth Kirchoff, his wife, one of the heirs of Michael Diversey deceased of the city of Chicago, in the county of Cook and State of Illinois for the consideration of one dollar and other valuable con-

siderations convey and quitclaim to the Union Mutual Life Insurance Company a corporation created and existing under and by virtue of the laws of the State of Maine, all the following-described real estate situate in said county of Cook, to wit, lot- one (1) two (2) three (3) ten (10) eleven (11) and twelve (12), in block four (4) in Knoke and Gardner's subdivision of twenty (20) acres north and adjoining the south thirty (30) acres of the west half of the north-west quarter of section number twenty-eight (28), township forty (40) north range fourteen (14) east of the third principal meridian. Also lot number twenty-six (26) in O. J. Rose's subdivision of the east half of block twenty-eight (28) in the Canal Trustees' subdivision of west part of section five (5), township thirty-nine (39) north, range fourteen (14) east of the third principal meridian. Also lot ten (10) in block sixty-four (64) original town of Chicago, with the three-story brick building situate thereon. Also block twelve (12) and the east three and one-tenth (3.1) acres of block three on William Lill and heirs of Michael Diversey's division of the southwest half of the northwest quarter of section twenty-nine (29) township forty (40), north range fourteen (14), east of third principal meridian. Also lot three (3) in the subdivision of the northeast corner of block fifty-three (53) in Kinzie's addition to Chicago. Also lots numbers two (2) and four (4) in block numbered twenty-one (21) in the Canal Trustees' subdivision of the south fraction of section three (3), township thirty-nine (39), north range fourteen east of the third principal meridian, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of said State of Illinois.

This conveyance is given and accepted in satisfaction of certain indebtedness of the said Julius Kirchoff and Elizabeth Kirchoff, secured by a trust deed on said premises given by the said Julius Kirchoff and Elizabeth Kirchoff his wife and Angela Diversey to Levi D. Boone, trustee, dated the 8th day of May in the year eighteen hundred and seventy-one, and recorded in the recorder's office for the said county of Cook in Book 649 of Deeds, page 131.

Dated this fourth (4th) day of September, in the year eighteen hundred and seventy-nine.

JULIUS KIRCHOFF.

ELIZABETH KIRCHOFF. [SEAL.]

To which is annexed the certificate of acknowledgment by Julius Kirchoff and Elizabeth Kirchoff before Harry Rubens, notary public, dated Sept. 5, 1879, and recorder's certificate that said deed was filed for record November 8, 1879, and duly recorded.

Q. Look at the letter book I now hand you, marked April 26th, '79, to February 28th, '80, on page 461, and state what it purports to be.

A. This is a press copy of letter signed by me, addressed to the Union Mutual Life Insurance Company, dated November 17th, 1879.

Q. Will you please read such portions of it as refer to the Kirchoff loan?

A. This purports to be in reply to the president's letter of the 14th of the same month, and contains the following reference to the Kirchoff matter, viz: "In reply to president's third favor of same date, relative to Kirchoff and Maher cases, I have to say that the deed from Kirchoff and wife to the company has been recorded and will be forwarded as soon as received from record. I expect to give this case all the additional 'fixing up' that it requires, and to be able to report the same as completed before the 1st of January."

Q. Do you remember when proceedings were commenced in the United States court to foreclose the Kirchoff trust deed?

A. I do.

Q. At about what date?

A. I think it was on or about the 11th of July, 1878; I think I fixed the date in my examination-in-chief from memoranda which I had then, but have not with me now.

Q. Were you pressing these foreclosure proceedings from that time until the final sale of the premises under decree?

A. I was conducting the foreclosure proceedings on behalf of the insurance company.

Q. You have testified to appraisals made of the property covered by this trust deed. At the time Kirchoffs executed the quitclaim deed to the company was the property covered by the trust
128 deed considered by yourself and the other officers and agents of the company as worth the claim the company had against the property?

A. I don't think it was—that is, I don't think I considered at that time that the property would sell for the amount of the debt, and when the appraisal was made by Mr. Reese, in the summer of '78, his valuation was considerably below the amount of the indebtedness.

Q. Could you as the attorney of the company have taken a deficiency decree against the Kirchoffs for the difference between what the property sold for under the decree of the court and the claim under the trust deed?

A. I could.

Q. Do you remember when Warfield was appointed receiver of the property covered by the trust deed, including the homestead property?

A. Yes; I recollect about when he was appointed; I think it was in September, '78.

Q. Was it prior to the execution of the quitclaim deed to the company?

A. It was; it was a year, at least, prior to the execution of the quitclaim deed.

Q. Did the Kirchoffs execute a lease to Warfield?

A. I understand they took a lease from Warfield as receiver of the homestead.

Q. Do you know whether there was any clause in that lease referring to any agreement to redeem the homestead?

A. I don't know; I don't know that I ever saw the lease; I understood there was a lease given.

Q. Did you ever receive instructions from the insurance company to eject Kirchhoff from the premises on account of the non-payment of rent?

A. I don't recollect receiving any special instructions from the company on that subject.

Q. Look at the report I hand you, dated May 31st, 1880, and state what it purports to be.

A. This is a report, dated May 31st, 1880, signed by me. It appears to be one of my regular monthly reports, and on the first page, under the title "Kirchhoff," I report to the company that on the 28th of May of that year I received a letter from Mr. Warfield, as receiver, saying he was unable to collect rents now due from premises occupied by Kirchhoff, and requesting that measures be taken to eject him, and I shall make application to the court for assistance in this matter as soon as the national convention is over, the court having adjourned during the meantime.

Q. Will you look at the letter book I now hand you, marked "Kendall & Bliss;" also "9 K," on page 25, and state what you find?

A. This is a press copy of a letter written and signed by me, addressed to the Union Mutual Life Insurance Company, dated November 2nd, 1880.

129 Q. Will you read that letter, omitting therefrom a tabulated statement of the disbursements?

A. The letter is as follows:

"I submit the following statement of the Kirchhoff case in the matter of the sale under decree of foreclosure: Decree entered August 30, '80, for \$91,358.16." Then follows a statement of interest and costs and giving a statement of the amount bid at the sales and a statement of the deficiency. Then follows: "Herewith please find certificates of sale as follows:" Then there is a tabulated list of the certificates of sale issued by the master in chancery, in which it appears that lot two, block twenty-one, being the homestead property referred to, was bid in by the company for \$9,000, and lot four of the same subdivision, being the Pine Street lot, so called, for \$8,000. Then the letter reads as follows:

"It seemed to be the best to bid in these pieces of property for about enough to satisfy the decree and costs, partly because a deficiency decree would be worthless, and it was also understood between the parties to the suit, Kirchhoff and wife and Mrs. Diversey, that in consideration of their quitclaim deeds no deficiency decree should be taken, and partly because it might enable the company to sell the property before the master's deed will be issued in January, 1882. Holding, as you now do, the deed of Kerchoff and wife and certificates of sale for probably, in most cases, much more than the market value of the property, so that a purchaser, being the assignee of the certificate for a sum much less than its face, would have no fear of redemption by any creditor, it seems now that the property might all be put into the market. This policy in regard to the bids has, of course, added a few hundred dollars to the expense of foreclosure; perhaps two hundred dollars; but on such a large amount

of property that will not weigh against the advantage to be derived from holding it at high figures." That appears to be all that relates to the matter of the foreclosure proceedings.

Q. Look at the report I now hand you, dated January 3rd, 1881, and state what it appears to be.

A. This is a report signed "Kendall & Bliss, att'ys," addressed to the Union Mutual Life Insurance Company, dated January 3rd, 1881, and is in my handwriting.

Q. Please read from that report such parts as refer to the matters in controversy in regard to this loan.

A. There seem to be three pages here relative to the various phases of the Kirchoff business. On page 3 the report reads, among other things: "Since our last report all of the Kirchoff property has been sold under foreclosure decree and bid in for the company, the particulars of which sale, etc., were duly reported by letter at the time and the fifteen certificates of sale forwarded. Kirchoff himself still remains in possession of the lot on the corner of Rush and Pearson streets, and Mr. Gallery, who was appointed receiver in place of Mr. Warfield, has not been able to collect much rent from him, although he gets plenty of promises, and says he got one cigar the other day. We can, of course, make but a
130 case of forcible detainer against Kirchoff and eject him at the end of a lawsuit, but the premises don't seem very valuable for rent to any one else, and we have been hoping Kirchoff would get his business going, so as to pay up. It looks rather dubious, however, and if the company prefer we will go for him."

Q. Do the letters and reports that you have read show correctly the proceedings that were had in regard to the foreclosure of the trust deed to the company, and also the settlement with the Kirchoffs?

A. I don't know. What statements have been read from my reports are substantially correct so far as they show the transactions.

Q. Would they not be more likely to give a correct statement of the negotiations as they occurred than you could give from memory at this day, they being written down at the time?

A. I should say that the chances were that they would be more likely to be absolutely correct, so far as dates and event- were concerned.

Q. Is it not possible that from the long lapse of time there may be a confusion in your mind as to what really did occur, and that the agreement to which you have testified in relation to the redemption of the homestead may have been merely in the form of negotiations and never have come to a final settlement?

A. Well, I didn't make the agreement, and I have not testified to having made the agreement myself. What I know about it was chiefly derived from my conversations with Warfield and Kirchoff, the way the matter was treated in my presence by them as a settled thing, so far as the terms on which the redemption or repurchase, whatever you may call it, were to be made. I, as attorney for the company at the time and acting in their interest, never favored this project of Kirchoff buying back or redeeming those lots, because I

had serious doubts about his ability to carry out any such agreement and did not have much faith in it.

Q. Did he ever express himself as ready and prepared to carry out the agreement as understood by him?

A. Yes; I think he has proposed to me at times his readiness to carry out the agreements. My recollection is that he referred to it when I met him a good many times. I think I treated the matter rather slightly, because I did not feel much interest in it and never thought it was particularly good business for the company, and always doubted Kerchoff's ability to carry it through.

Q. During all this time were you able to collect rent from him?

A. I never made any effort to collect any rent from him. I understood the receiver collected some rent from him—a little, but not much—and was unable to collect from him.

Q. Did he ever make a tender of any money for the purpose of carrying out this agreement?

A. Not to my knowledge; he never made any tender to me.

(Adjourned.)

131 It is stipulated that the letters and extracts from reports and the deed read by witness may be considered in evidence, and that the master need not attach to this deposition said original papers.

The defendant agrees to produce said letters and reports and deed for the inspection of the counsel for complainant, and will produce them upon the trial of the case if desired.

_____,
Solicitor for Complainant.

_____,
Solicitor for Defendant.

KIRCHOFF
vs.
U. M. INS. CO. of MAINE. }

JANUARY 22ND, 1885—2 o'clock p. m.

Parties met pursuant to agreement.

Present: On behalf of plaintiff, Mr. W. S. Harbert; on behalf of defendants, Mr. Edward Swett.

Redirect examination of ROBERT B. KENDALL.

By Mr. HARBERT:

Q. Referring to the early part of your cross examination, in which you testify concerning your employment and authority as attorney, please state to what extent, in the absence of express instructions from the company, you and Mr. Warfield attended to the current and general business of the company.

A. We acted under our general authority and instructions in carrying out what was understood to be the general policy and wishes of the company in regard to the transaction and settlement of their

business in connection with the various loans in Chicago and the real estate acquired by them.

Q. What was the scope of Mr. Warfield's employment and work?

A. The general scope of his authority and work was the collection of the interest and principal of the loans coming due from time to time to the company, the negotiation of terms of settlement with delinquent borrowers, either by taking their property in satisfaction of their indebtedness or making terms upon which they could redeem or carry their loans, making the burden a little lighter where it was necessary, and generally to get all he could for the company, and also his business was to sell and dispose of the property that came into the company's hands under these various mortgages, negotiate sales under the general and special instructions received from time to time, carrying out a general policy as understood on the part of the company, to dispose of their real estate as fast as he could without any greater sacrifice than was necessary. It was generally understood that the company would sell any of their real estate at appraised value and upon easy terms of payment and low rates of interest to induce parties to purchase, times being

132 very dull then and the company acquiring a good deal more real estate than they wanted to carry here. Mr. Warfield acted under general instructions to that effect, which were, of course, modified from time to time by special instructions in particular cases received from the company, but generally, so far as he made sales of property upon those terms of payment, they were ratified and approved of by the finance committee of the company as a matter of course.

Q. What were the terms upon which it was understood sales were to be made as of course?

A. Well, the general rule was that they would sell upon the payment of a small proportion of the purchase-money down; one-tenth was the rule. In cases where he could readily make better terms he was expected to do so, but it was always understood that the company were ready and willing to dispose of their property upon payment of one-tenth cash and distribute the rest over a term of five or ten years, ten years in many cases, with an annual or semi-annual payment of principal and low rate of interest.

Q. Had the company on hand at about the time of this Kirchoff transaction any considerable amount of property?

A. Yes; they must have had a very large amount of property on their hands here.

Q. Had any of this property been purchased or was it all or nearly all taken in payment of loans?

A. Oh, it was substantially all acquired by foreclosure of trust deeds, mortgages, or by the surrender of property on the part of the borrowers.

Q. When debtors surrendered their property on a compromise had you any custom with regard to the deeds expressing the fact that the property was taken in payment of indebtedness or the like?

A. It was my rule to insert in every deed to the company a clause

to the effect that it was taken for the indebtedness that had been secured by it.

Q. Was there any special reason why this was done?

A. Yes. I had this reason: That it was a matter of doubt, to say the least, whether the company, being a foreign corporation, had any right to acquire the title to real estate in Illinois by purchase except in satisfaction of indebtedness, and I always put that clause in so that the deed would show itself that it was not an out-and-out purchase on the part of the company, but that it was taken in satisfaction of a debt, sometimes in lieu of a foreclosure and sometimes as a supplemental proceeding to a foreclosure; but the object in inserting that clause was to avoid any question as to the right of the corporation to acquire a title to land.

Defendant's counsel objects to so much of the above answers as does not appear to be of the witness's own knowledge; and, further, as to that part of them referring to the scope of the authority of Mr. Warfield, it not appearing but that his appointment was in writing and the witness not stating the source of his information.

Q. I call your attention to the clause inserted in the deed from Kirchhoff and wife to the company reading: "This conveyance is given and accepted in satisfaction of certain indebtedness," etc. Is the foregoing about the style and substance of the clauses to which you have referred as being inserted for the purpose of showing that the conveyances were not in pursuance of a purchase?

Objected to as immaterial.

A. Yes; it is substantially, and I think actually, the form and phraseology that I had adopted and made use of in such deeds.

Q. Then, as I understand you, these clauses were inserted for the benefit of the examiner of the title and not as expressing necessarily the consideration for the deed?

A. Yes; that was the purpose of inserting that clause.

Q. And was that true in this case as in others?

A. Yes; it was.

Question and answer objected to as incompetent.

Q. When did you first have knowledge of the agreement between the company and Mr. Kirchhoff with reference to the purchase or redemption of his homestead at the proposed value put upon the property by Mr. Reese?

A. I do not know that I can state exactly. It was about the time the foreclosure proceedings were commenced, but I understood through Warfield and Kirchhoff that such an agreement had been made with Kirchhoff. I know that he expressed a desire to do so, and I know Mr. Warfield had given him some sort of assurances that the company would consent or would allow him to redeem his property in that way. Just when I first heard of the agreement being made I do not definitely remember.

Answer objected to.

A. (continued). I think it was about the time that I went around, as I before testified, I think, with Warfield and Kirchoff and Mr. Reese to view the property.

Defendant's counsel objects to the witness's statement of what he understood as not being within his own knowledge.

Q. You may state from whom you understood as to the agreement being made.

A. I understood from conversations I had with Warfield and with Kirchoff.

Q. When you went out with Mr. Reese to make this appraisal who went with you?

A. Mr. Kirchoff, Mr. Warfield, Mr. Reese.

Q. Do you know who hired the team on that occasion?

A. Mr. Kirchoff furnished the team—a carriage and a pair of horses and a driver—a good deal of style about it. I recollect he came around to the front of our office on La Salle St. and took us all in, and we went around and spent a half a day, I guess, driving around to see different pieces of property.

Q. And Mr. Kirchoff footed the bill?

A. I understood that he did. I recollect this about it, that
134 we visited all the property on the West and North Sides, and finally went to Mr. Kirchoff's residence, on the corner of Rush and Piersons Sts., the last thing. We got out and Mr. Kirchoff invited us in and opened a bottle of champagne. He seemed to have had it all ready.

Q. Was this agreement fully talked over at that time?

A. Yes; it was the subject of general conversation. The expedition was organized with this object in view, as I understood at the time, to fix a price on the property at which Kirchoff could redeem it from the mortgage or with a view to his redeeming it. That is the way I understood it at the time.

Q. Had you been consulted at this time with reference to whether a conveyance from the Kirchoffs would perfect the title in the company and enable them to reconvey to the Kirchoffs upon the terms proposed?

A. I do not recollect that I had been consulted at that time upon that subject. I know the matter was a subject of conversation at some time; but the matter of these judgments that were outstanding of record, as appeared by the abstracts, against Mrs. Kirchoff were spoken of by me as standing in the way of acquiring title and closing the matter by quitclaim deed, and I know then Mr. Kirchoff said that those judgments were all settled as a matter of fact, although they appeared outstanding on the record, and I afterwards ascertained that that was the fact; but just when that was discussed I do not recollect; some time during the time we were talking of settling up in that way.

Q. Referring to the letter of August 3rd, 1877, in your cross-examination, please state to what the same refers.

A. This letter refers to certain negotiations that had been going on with Kirchoff relative to funding the entire loan and making a

new set of mortgage papers and extending the time for the payment of it and making some modification of the rate of interest, reducing it.

Q. Please look at the book now shown you and state what the same purports to be (handing book to witness).

A. It purports to be letters from May 16th, 1877, to August 25th, 1877—a letter-press copy book containing letters from Mr. Warfield and myself addressed to the Union Mutual Insurance Company during that time.

Q. Please look at the pages now shown you and state what they are.

A. On page 322 there is a press copy of a letter in my handwriting, dated July 5th, 1877, signed by me and addressed to the Union Mutual Life Insurance Company, and on page 433 there is a letter dated July 23, 1877, addressed to the insurance company, signed by Mr. Warfield.

Q. Please read said letters and state to what they refer, and explain the same.

A. The first letter referred to is written with reference to negotiations then pending for the making of new papers for the entire indebtedness of this Kirchhoff loan and contains suggestions as to the way in which it might be done. It reads as follows:

“I have had search made for judgments against Kirchhoff and wife and mother-in-law, Diversey, with the following result: The total amount of judgments against Julius Kirchhoff, \$11,015.80; total amount of judgments against Elizabeth Kirchhoff, \$1,952.14. Of the last amount it appears from the records of the recorder's office that \$1,583 has been satisfied, although the judgment docket does not show it, which leaves only \$369.14. There are no judgments against Mrs. Diversey, who owned the farm at the time our trust deed was made and who is supposed to own it now. The title to most of the property was in Elizabeth Kirchhoff when the trust deed was given. The total valuation of all the property by Morey was \$76,480, and of this amount lots standing in the name of Julius Kirchhoff make up the sum of \$10,000. If upon examination no more serious objection to making new papers appears than the judgments against Mrs. Kirchhoff they need not stand in the way of making a new deal. The Kirchoffs could probably satisfy the judgments; but even if we were to take title subject to these small amounts, it might be better than the present state of affairs. I hope Kirchhoff will get up the abstracts, and if punching up will make him do so I'll see him well punched. It will not be practicable to make new papers to convey the lots standing in the name of Julius Kirchhoff on account of the judgments—and probably he don't own them. It will not take long, I think, to have an abstract made of the title to the farm, and it probably will not be very expensive.

Yours truly,

ROBERT B. KENDALL.”

The letter from Mr. Warfield reads as follows :

" Referring to loan 682, Kirchoff, will say that Mr. Kirchoff now says he did not understand the president to say that any portion of the principal was to be paid during the ten years. He says the agreement with the president was to execute new papers at five per cent. interest, giving Mr. Kirchoff ten years to pay the principal ; says he cannot make partial payments. Shall we execute the papers in accordance with what Mr. Kirchoff says was his understanding ? I understand the agreement to be for Kirchoff to pay five per cent. of the principal with each semi-annual payment, thus giving ten years in which to pay up the principal. Mr. K. will not do this.

Yours truly,

E. A. WARFIELD."

This letter of August 3rd, 1877, addressed to me by the president of the company, appears to be reply to the letters I have just read, or more especially the letter from Mr. Warfield. Warfield having stated that Kirchoff understood the matter differently and could not make partial payments, the finance committee, upon consideration of the matter, decided to let him have his own way about it, but the president requests me to have the time reduced to five years instead of ten, if I can.

136 Q. Please explain as briefly as you can the general outline of the plan it was sought to bring about by that correspondence and by the negotiations then pending.

A. I think I have already covered that in substance, so far as I recollect ; it was a general scheme for making new papers for the entire indebtedness, giving him an extension of five to ten years.

Mr. SWETT: But that has no relation to the present alleged agreement ?

A. These negotiations were carried on for some time during 1877, but were finally abandoned for some reason or other. I think papers were signed by Mr. and Mrs. Kirchoff, but I think Mrs. Diversey refused to join with them in the execution of the papers, and the thing fell through, and that letter of the 3rd of August refers to matters long previous and entirely distinct from any negotiations in regard to the homestead property loan.

Mr. HARBERT: Look at the letter of September 18th, 1877, in your cross-examination, and state whether or not the same expressed the situation and your views of matters at that time and whether or not the taking of the judgment as stated therein did not substantially terminate all previous negotiations in regard to funding the entire loan.

A. Yes ; this letter states my views of the matter at that time, and the entry of the judgment against Mrs. Diversey was practically the end of all negotiations looking to the making of new papers for the entire loan.

Q. That is, extending the loan in a different form ?

A. Yes.

Q. Do you remember the date of the Reese appraisalment ?

A. At the time I went with him ?

A. Yes.

A. It was very soon after the bill to foreclose was filed—that is, within a few weeks afterwards, I think, and, to the best of my recollection, I think I have seen some memoranda to the effect that it was on the 30th of August, 1878; I know it was about that time, at any rate.

Q. You have said that the letter you last referred to, being the one of September, 1877, substantially closed negotiations for the extension of the loan in a new form. Please state whether or not, shortly after that time, negotiations looking towards a settlement of the matter whereby Kirchhoff should retain his homestead upon payments were begun.

A. I don't recollect anything of the kind until after I filed the bill to foreclose the trust deed, which was in July, 1878. I don't recollect about any negotiations during that interval.

Q. That was an interval—

A. Of merely a year. I don't know why I did not commence to foreclose sooner, except pressure of other business.

Q. Do you know whether Mr. Warfield did or did not during that time have negotiations with Mr. or Mrs. Kirchhoff or Mrs. Diversey?

A. I do not recollect.

137 Q. Please state how soon after you began your foreclosure proceedings, in July, 1878, it was before negotiations were entered into with the Kirchhoffs and Mrs. Diversey relative to a settlement.

A. Well, I think that immediately after the commencement of the foreclosure proceedings Kirchhoff made some overtures to Warfield in regard to the matter, and as the result of that we made this tour of inspection. I do not recollect having any negotiations with Mrs. Diversey or her representative until about a year afterwards, I think; but I cannot say when they commenced. I recollect it was, I think, some time about September, 1879, when I prepared the papers for the settlement with Mrs. Diversey; but just when the negotiations that led up to that were commenced I do not recollect definitely.

Q. I believe you have stated that the negotiations with Mrs. Kirchhoff and with Mrs. Diversey were entirely separate?

A. Yes, sir; so far as I was concerned or had any knowledge of it.

Q. Please state whether there was or not a purpose to hold the Kirchhoff matter somewhat in abeyance until the settlement was also agreed upon, or state what the facts were in regard to that matter.

A. Well, I know I did not deem it practicable to make a settlement with Kirchhoff that would eliminate his property from the foreclosure proceedings and leave Mrs. Diversey out of the arrangement. I considered that it was necessary to make a settlement with her in order to be able to settle with Kirchhoff. The settlement with Mrs. Diversey was the subject of considerable negotiation on my part and was a matter of considerable difficulty. I always under-

stood that there would be no difficulty in settling with Kirchoff and his wife.

Q. Did Kirchoff, at any time after the appraisal, make a proposition to purchase the farm also as well as the homestead?

A. Yes; he did. I recollect there was something said about that.

Objected to as immaterial.

Q. Please state whether that negotiation was completed or fell through.

A. That fell through. He was not willing to give so much as we thought was necessary.

Q. I will call your attention to your report in your cross-examination, an extract of November 25th, 1878, and ask you to state whether the negotiation therein referred to about the purchase of the farm was the one to which you just referred and which came to naught.

A. Yes; this seems to be the matter that I referred to just now.

Q. Please look at the letter I now show you, dated January 1st, 1879, referred to in your cross-examination, and state whether it correctly stated the facts, and what, if anything, was in the way at that time of executing the agreement which had been made with Mr. Kirchoff for the purchase or redemption of his homestead.

A. This letter correctly set out the facts at the time, and 138 it states why settlement could not at that time be made of the Kirchoff loan. I say in this letter, "I do not dare to settle with him without settling the whole case, as it might prejudice our claim against Diversey."

Q. Please state whether or not in case an agreement with Diversey had not been arrived at it would not have been necessary, in order to have carried out the agreement with Kirchoff, for the company to have foreclosed and gotten title by the foreclosure before it could have executed the contract with Kirchoff without prejudicing its rights.

A. That would seem to have been my opinion at the time, and is now, for that matter, that unless an amicable settlement had been made with Mrs. Diversey that foreclosure decree would have been necessary for the protection of the title of the property in the company.

Q. Please state whether or not those facts were communicated to Mr. Kirchoff at the time.

A. I do not recollect that I communicated that fact to Kirchoff at the time. I remember subsequently, about a year after this, at the time I amended my bill by bringing in Runyan and Stanford that I explained the necessity for making the foreclosure to him at that time, but I do not recollect doing so about the date of this letter.

Q. At the time you did explain the same did you explain to him the necessity for making the foreclosure in order to perfect the agreement with him?

A. Well, yes; I explained it in some such way as this, that in

order to make the title to that property good (the homestead property) in the company, so that they could convey good title to him and take a good mortgage back from him, it was necessary to get rid of this intervening incumbrance caused by the sheriff's deed, and that in order to do so the better way was to go on with the foreclosure and get a decree and have the property sold. I recollect that Mr. Kirchhoff came into my office at that time (I guess I have already stated this) and was a little excited because he thought we were, as he expressed it, suing him again when there was no need of it, as he was ready to close up the matter without any further litigation; that he had agreed to that effect with the company, so I felt called upon to explain to him why that step was taken and why we went on at that time with the foreclosure; he appeared to be rather suspicious that we were not acting in good faith with him, and I was at considerable pains to explain the matter so as to disabuse his mind of any such impression.

Q. Please state whether or not, in correspondence and other memoranda of the company, this entire matter, namely, the loan you have testified about, secured by property of the Kirchoffs and of Mrs. Diversey, was generally called the "Kirchhoff matter" or "Kirchhoff loan."

A. Yes; it was usually spoken of as the Kirchhoff loan number 682; there was another Kirchhoff loan, some other Kirchhoff on the books of the company.

139 Q. Please state why the correspondence along in the latter part of 1878, through 1879, relating to this so-called Kirchhoff loan generally, speaks of a settlement with a Mrs. Diversey instead of a settlement with Kirchhoff, if you know.

A. Well, I suppose that was the stumbling block in the way; that was the settlement that we found difficulty in making.

Q. Then there was no question during that time about the Kirchhoff matter, as you understood it?

A. No; not that I recollect of; it was generally supposed that we could settle it with the Kirchoffs without any difficulty; we knew what they were willing to do, but Mrs. Diversey was litigating the foreclosure case and had set up defenses there, and there were various things that interfered with the settlement with her.

Q. And is it not true that the Kirchoffs had been informed as to what the company would do?

A. Well, I suppose they thought they knew what the company would do; they seemed to have quietly rested under some sort of a belief that the company would settle with them on what they understood to be the terms of settlement.

Answer objected to as unresponsive.

(Answer continued.) I would not care to answer that by yes or no.

Q. Please look at the extract of a letter which I now show you, purporting to be from Daniel Sharpe, vice-president, bearing date January 8, '79, and state from what place the same was written and what is meant by "Diversey suit" therein referred to.

A. This letter was written by Mr. Sharpe, vice-president of the company, from Boston. As I recollect, the letter was produced here the other day, when I read it. I understand that what he means by Mrs. Diversey's suit was an old case that had been commenced against her husband during his lifetime and had been revived and carried on against her, as administratrix of her husband's estate, by a person named Johnson.

Q. Had it any connection with this loan?

A. It had no connection with this loan matter at all; that was something that I had talked over, probably, with Mr. Sharpe, or, at any rate, I had written to the company about it, as a claim had been brought up in that suit to have the Kirchoff property, Mrs. Kirchoff's property which she inherited from her father, subjected to the payment of a judgment that Johnson had recovered, together with the property of the other heirs of Michael Diversey, but it had nothing whatever to do with the matters we were trying to adjust, but was entirely outside of it. When he wrote that letter Mr. Sharpe evidently misapprehended the bearings of it.

Q. I will call your attention to your letter bearing date January 14th, 1879, in reply to the letter last referred to, and ask you to state whether or not that is an attempt to explain to Vice-President Sharpe the fact that the so-called Diversey suit was disconnected from this transaction and explained what the same was.

140 A. Yes; this letter of mine is written to correct the misapprehension that Mr. Sharpe evidently labored under in regard to the effect of the suit Johnson *vs.* Mrs. Diversey, and in the letter I explained that it did not affect the title to the Diversey farm at all.

Q. Please state whether or not the agreement which had been made with Mr. and Mrs. Kirchoff was in any way dependent upon any proposed arrangement with Mrs. Diversey so far as Kirchoff was concerned.

A. I do not think it was ever expressed in that way to Kirchoff; that settlement with him was contingent upon settlement with Mrs. Diversey or dependent upon it. I never supposed that Kirchoff could assist us in making a settlement with Diversey, consequently never said much to him about it. At that time he did not seem to have much influence with his mother-in-law, as she seemed to be under the influence of Mr. Weckler, and Kirchoff did not seem to care at all, and I concluded that Kirchoff could be of no assistance in the settlement of the Diversey part of the case and never consulted him about it for that reason.

Q. Do you remember whether Vice-President Sharpe was here at any time during the pendency of negotiations in regard to the settlement of the Diversey branch of the case?

A. Yes; he was here once at least, because the matter was referred to him by the president of the company when he was here. He was especially requested, I think, to take a hand in the matter and see what he could do.

Q. Was he at that time informed of all that had occurred so far as you knew of the agreement already made with Kirchoff and of

negotiations that were being carried on with Mrs. Diversey in regard to a settlement of her branch of the case?

A. Oh, I think so, fully.

Q. State whether or not he acquiesced in the same or otherwise.

A. Well, as I recollect, Mr. Sharpe was, so far as this Diversey matter was concerned, rather non-committal when he was here; he did not seem to want to agree to a settlement that involved any concessions on the part of the company, and consequently he did not afford much assistance to us at that time.

Q. How was it with reference to the Kirchhoff agreement?

A. I have no recollection as to that. I recollect in regard to his course in the Diversey matter more from reading the correspondence since then—my letter to the company—in which I referred to Mr. Sharpe's visit here, and that he did not bring matters to a settlement and did not authorize me to; then his letter of the 8th of January, 1879, in which he expressly authorizes me to go ahead and make a settlement upon the terms I had suggested.

Q. Did he make any objection at all to the agreement as already made with the Kirchoffs?

A. Not that I know of.

Adjourned.

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KIRCHOFF
vs.
U. M. INS. CO. }

FEBRUARY 6TH, 1885.

Parties met pursuant to agreement.

Present: Mr. W. S. Harbert, for complainant, and Mr. Edward R. Swett, for defendants.

ROBERT B. KENDALL.

Redirect examination by Mr. HARBERT (continued):

Q. Please look at the book now shown you and state what the same is. (Hands book to witness.)

A. Well, this appears to be letter-press copies of letters from the Union Mutual Life Insurance Company from November 30th, 1878, to December 17th, 1878.

Q. Please look at page 85 of said book and state what appears to be thereon.

A. It appears to be a press copy of a letter from John E. De Witt, president of the company, to Daniel Sharpe, vice-president, dated December 2nd, 1878.

Q. In whose handwriting is it?

A. It is in the handwriting of a gentleman who was employed by the company as a stenographer. I do not recall his name just now, but I knew him very well.

Mr. SWETT:

Q. Signature and all in his handwriting?

A. Signature and all.

Q. Please read the same.

A. The letter reads as follows:

"Daniel Sharpe, vice-president.

DEAR SIR: Your two favors of the 27th at hand. Note your comments about Loeb; also about the Couch property. In Kendall's report, just received, he speaks about a proposition and an adjustment of the Kirchoff loan. Now, I would suggest, if you will allow me, that you get Kirchoff and Mrs. Diversey and the other son-in-law into our office or somewhere else and have an interview with them, and see if you cannot get the loan straightened out. By your acting as an intermediate party the thing can be accomplished; at least, it is so large an interest it is well worth the attempt

Yours truly,

JOHN E. DE WITT, *President.*"

Q. Please state whether or not you remember the circumstances of the vice-president being in Chicago at about the date of that letter; and, if so, state what you recollect about it.

A. I recollect that about this date Mr. Sharpe was here in Chicago, and that this matter of adjustment of the Kirchoff loan, including some sort of a settlement to be made with Mrs. Diversey, was referred to him by the president, and I think I was also instructed or requested by the president to confer with Mr.

142 Sharpe in regard to the matter while he was here, and that I did talk over the matter with him and explain the position of things and the claims and defenses set up by Mrs. Diversey to the foreclosure suit and the negotiations I had been having with or through Mr. Weckler in regard to a compromise and settlement of the matter. Mr. Sharpe did not decide, I recollect, at that time while he was here whether the company would agree to the proposed terms of settlement or not, and after he returned to Boston I so informed the president of the company. I then received from Mr. Sharpe the letter, which has already been introduced and read in evidence, authorizing me to settle the matter with Mrs. Diversey upon certain terms.

Q. To what extent, if at all, was the settlement which had already been agreed upon between the company and Mr. Kirchoff talked over between Mr. Sharpe, Mr. Kirchoff, Mr. Warfield, and yourself during Mr. Sharpe's visit to Chicago at that time?

A. I don't recollect that the Kirchoff branch of the case was discussed with Mr. Sharpe. The Diversey matter was. It was giving me the most trouble, because I already knew that there would be no difficulty in settling with the Kirchoffs; that they were willing to surrender their property in settlement of the indebtedness against them, and only wished to stipulate for a reconveyance of their homestead to them, which they seemed very desirous of saving; for that reason I do not think there was very much said to Mr. Sharpe. I do not recollect; if anything was said it was probably to that effect; that there was no difficulty in adjusting the matter with the Kirchoffs if we could only settle with Diversey.

Q. On the 1st of November, 1879, you write to the company that

"Among a lot of deeds forwarded from this office for execution by the company is one to Kirchhoff of his homestead lot, so called, which bears even date with the quitclaim deed given by Kirchhoff and wife to the company," etc. What deeds, if you remember, were included in the lot of deeds forwarded then?

A. I cannot recollect what the other deeds were. They used to accumulate in my hands, and I would send them forward about as fast as they were recorded. Sometimes I would have quite a lot of them—tax, foreclosure, and various kinds.

Q. Do you remember when you received the deeds from Mrs. Diversey and from Mrs. Kirchhoff?

A. Well, I remember about when I received them. I think in some reports of mine that have been introduced in evidence the dates are given when I received them. Those dates are correct.

Q. You may state what you did with the Diversey deeds, as to whether you recorded them or not.

A. Yes; the Diversey deed was put on record, and after record was forwarded to the insurance company.

Q. State whether or not you recorded the Kirchhoff deed at the same time.

A. I filed the Kirchhoff deed for record, but not at the same
143 time. The deeds, I think, were delivered to me about the same time. By reference to my reports I can fix the date, if necessary.

Q. Why did you not record the Kirchhoff deed when you received it?

A. Well, the Kirchhoff deed having been executed by Kirchhoff, as he explained to me, with the understanding on his part that he was to have a deed from the company of his homestead and of the adjoining lot on Pine street, I didn't feel at liberty to receive the deed unconditionally until I had communicated with the company in regard to the conveyance to be made to him, and I told Kirchhoff I would hold the deed until I had written to the company on that subject; that while I had not any doubt that the company would make a deed to him of the lot or lots—of the homestead—on the terms proposed, I did not wish to do anything finally in the matter without first having the formal authorization on the part of the company. I did not wish to take the responsibility upon myself of receiving a deed from him with any such understanding without first getting some direct authority from the company to do so, as a matter of precaution, to avoid any misunderstanding between the company and myself, so I simply placed his deed on file in my office to await the result of my letter to the company. I think I prepared the quitclaim deed from the company to Kirchhoff soon after, probably as soon as I could get time to attend to it, and forwarded it. The Diversey deed was placed on record because that matter I considered as settled, and that I had had the proper authority in writing from the company to warrant my closing the settlement.

Q. In the Diversey matter there was nothing to come from the company to Diversey, was there?

A. No; only the release deed from Dr. Boone, the trustee, which

had been agreed upon and which I procured and delivered to Mr. Weckler as Mrs. Diversey's agent.

Q. Dr. Boone was then living here, was he?

A. Yes; Dr. Boone was the trustee in the trust deed which I had been foreclosing or trying to foreclose.

Q. The deed which you sent on for the company to execute to Mrs. Kirchoff was subsequently returned unexecuted, was it not?

A. No; it never was returned to me; the draft of the deed was not returned. I received a letter from the company declining to execute it, but they didn't return the draft of the deed to me.

Q. Referring to the letter of Nov. 1st, 1879, you state that so far as you know the price was not definitely fixed, and you also say: "I have always told him that the company would not like to sell without a payment in cash on the delivery of the deed, so that is an open question as well as the price." Please explain what you meant by those expressions.

A. I suppose from the inspection of this letter and from my recollection of the circumstances that I desired by this letter to avoid taking any responsibility upon myself for fixing the price
144 upon that property—that is, the price the Kirchoffs should pay to redeem or repurchase it—that being rather out of my line of duties, and although I understood, I think—in fact I am very clear that I must have understood at the time that Kirchoff and Warfield had agreed that the price was to be the appraised value, yet I think I preferred to disclaim having anything to do with that part of the matter, and so I wrote that there was an understanding between Warfield, Kirchoff, and myself that the company would sell this lot back to him and allow him to pay for it in installments; that being in pursuance of the general line of policy of the company in such cases, I felt authorized in becoming a party to it; but I did not care to put myself on record as having fixed the price on it. Perhaps I desired to hedge a little so as to avoid any possible misunderstanding or censure on the part of the company that I had overstepped the line of my duty.

Q. Is that true with regard to the other matter relating to the time of payment?

A. Well, I stated in my letter that Kirchoff had always objected to paying anything down in cash. My recollection is that the objection to paying anything in cash was made at about the time he delivered his quitclaim—that is, so far as this particular transaction was concerned. When they were negotiating for a refunding of the entire indebtedness upon terms of partial payments I know that it fell through because he didn't want to make cash payments. He wanted to let the whole thing run until the end of the term, but, as I recollect, at the time he brought in his quitclaim deed to me we talked over the matter of his redeeming his homestead, and he, as I write in my letter, expressed a preference for the semi-annual payments, but wanted the first payment to commence six months ahead—six months after the delivery of the deed—rather than, as had been our universal rule, upon the delivery of the deed, and I know I told him that I would submit that proposition to the

company, but that I had no idea they would accept it, because they never did; always required a payment down, but with that exception I had no doubt in my mind but what they would make the reconveyance to him upon the terms as understood by him, and that exception I understood was a modification, which he wanted me to procure for him or to suggest to the company. I discouraged him in that, but nevertheless told him I would submit it, and did so in this letter.

Q. State whether or not he made it a condition to the completion of the agreement or whether it was in the nature of a request for his accomodation.

A. Well, I have already stated that he put it in the way of a request for a modification of the terms, as I understood at the time.

Q. What was the express consideration moving Kirchoff to convey his property to the company?

A. Do you mean the consideration expressed in the deed?

Q. No; the consideration expressed by him—what he urged as the chief consideration to him for a quitclaim deed to the company.

A. Well, I don't know how to answer that. I can only
145 say that from all his talk I supposed he wanted to get rid of his obligations to the company and retain in some way his homestead. He seemed to be more anxious about holding onto that homestead than anything else. I understood that was the inducement moving him.

Q. The homestead consists of two parcels, does it?

A. I don't know what the homestead, strictly speaking, consists of. There were two parcels of land and they adjoin each other. On one lot his house stood and the other lot was vacant.

Q. In your testimony heretofore in speaking of the homestead, state whether or not you have referred to or included these two parcels as the homestead property.

A. Well, I think I treated the corner lot as, strictly speaking, the homestead lot. I know I prepared the deed for that lot only, and in my letter to which you have drawn my attention I think I distinguished that lot as being the homestead lot. There was not any "homestead" about it, except it was the place where he lived. The title to all the property stood in his wife's name.

Q. But in the agreement for redemption state whether or not the two lots were included.

A. Always, so far as I know. In all that I knew or heard of the agreement in regard to his redeeming, the two lots were considered together. He wanted to buy back these two lots. I made a deed of one only, as I have already explained, I think, because I thought that was fully as much as he was able to undertake to pay for.

Q. What did you do after you received the information from the company that the company declined to execute the deed to Kirchoff?

A. Do you refer to the letter of November 5th, 1879?

Q. Yes.

A. In which the president writes me that the finance committee

declines to sell the property to Kirchoff for \$7,000, but would sell it for \$8,400, etc.?

Q. Yes.

A. Well, I replied to that letter under date of Nov. 8th and my letter has been read in evidence. I stated in my reply that I had communicated the company's decision to Kirchoff. I think Mr. Swett asked me if I did communicate the decision of the company to Kirchoff and I stated then that I did not recollect whether I did or not. I wished to explain that because I have remembered since then that I did in some way, either by letter or in person, inform Kirchoff that the company declined to execute the deed on those terms and for that price, and, in fact, gave him the substance of the company's letter. I do not remember just how I did that, but I know I had an interview with him (I recollect now) after the receipt of that letter, and probably very soon after the receipt of it, in my office, at which interview the matter was talked over and he was fully advised of the decision of the company. I do not know whether that is important or not, but I remember saying on cross-examination I did not recollect.

146 Q. State whether or not in that interview Kirchoff claimed or maintained his right to his homestead lots, or what he said.

A. Well, I don't recollect exactly what he said. I recollect the substance of the conversation on his part was that he had an agreement for the reconveyance of his homestead on the payment of the appraised value to be paid in installments as has been already mentioned.

Q. Did he say anything about their standing by it or abandoning it or anything of that purport?

A. No; he did not say anything to indicate any intention of abandoning his claim; he rather insisted upon his right to have his deed according to his understanding.

Q. Did you record the deed from Kirchoff and wife to the company yourself?

A. I either did it myself or it was done under my direction.

Q. Please look at the deed now shown you and state when the same was recorded. (Hands same to witness.)

A. This is the deed from Kirchoff and wife to the Union Mutual and appears to have been recorded on the 8th day of November, 1879. I said this deed was either recorded by me or under my direction; that is only a supposition on my part. I have no recollection in regard to recording it.

Q. Please state whether or not at or about the date of the record of that deed you had any conversation with Mr. Warfield in regard to the company's action in refusing to go forward and complete the agreement with the Kirchoffs; and, if so, state what the same was.

Objected to as incompetent and immaterial.

A. I recollect having some talk with Warfield, after the receipt of the letter from the company in which they declined to execute

the Kirchoff deed, relative to the matter, and Mr. Warfield took the ground that Kirchoff was entitled to a conveyance, and that it had been clearly understood between him and the company that he could repurchase his property, that portion of it, at least, at its appraised value and upon the partial-payment plan, and that the company—or president, rather—was not acting in good faith in the matter in declining to convey at the price and in demanding a larger payment than had been talked of. I think Mr. Warfield expressed himself several times to me quite as strongly in the matter to that effect.

Q. After the title became so far perfected in the company by foreclosure and sale do you know whether the company ever tendered Mr. or Mrs. Kirchoff any deed of the property asking the mortgage back for the deferred payments?

A. Never to my knowledge. I have no reason to suppose that they ever did.

Q. How soon after the 8th of November, the date of the record of the deed from Kirchoff to the company, was it ascertained that a foreclosure would be necessary in order to perfect the title notwithstanding the quitclaim deed?

147 A. I don't recollect how soon after that I discovered the necessity for proceeding with the foreclosure suit. I think I amended the bill for the purpose of bringing in the additional defendants in January following, some time.

Q. It was, then, between the 8th of November and the date of the amending of the bill that you discovered the necessity of going on with the foreclosure, notwithstanding the deed?

A. I think it was. I may have discovered it at about the date. I don't recollect.

Q. State what was Mr. Kirchoff's attitude right along from the time of the recording of the deed, so long as your connection with the company continued, with respect to his rights to have a conveyance of his property back whenever the company could safely grant it and upon the terms which had been agreed upon.

A. Well, so far as I know, Kirchoff claimed that he had a contract with the company for the reconveyance of the two lots in question; I do not recollect that he was particularly urgent or persistent in making his claim. He did not come near me much. The only occasion after that time when he came to see me in regard to the matter, as far as I recollect now, was at the time I amended the foreclosure bill by making Runyan and others parties, which I have already testified about. He came in then and wanted to know what it all meant, said he thought it was all settled and there was to be no further proceedings in court, and so forth, and I explained the matter to him.

Q. Look at the letter book I now show you and state what the same is.

A. This is a letter-press copy book of the Union Mutual Life Insurance Company containing press copies of letters written by the president and other officers of the company from the principal business office of the company.

Q. Examine page 606 of said book and state what the same purports to be.

A. On page 606 there is a press copy of a letter dated March 14th, 1879, addressed to me in Chicago by John E. De Witt, president of that company.

Q. Did you receive the original of which that is a copy?

A. I have no recollection of receiving that letter. I presume I did if it was sent.

Q. Please read the same.

A. The letter reads:

" MARCH 14TH, 1879.

R. B. Kendall, Esq., 133 La Salle St., Chicago.

DEAR SIR: We desire to call your particular attention to the following loans, the overdue interest on which is very large and daily increasing:

No. 74 and 214, Maher.

9, 88, and 439, Rae.

236, 293, and 331, Julian.

629 and 1607, Larmon.

148 682, Kirchoff.

730, Burroughs.

785, Jones and Chapin.

1044, Campbell.

1165, Mason.

1170, Holland.

1335, Couch.

1375, Byrne and O'Brien.

1571, Stinson.

We wish vigorous measures to be taken in all the above cases that will permit of it, and wish matters pushed to a speedy settlement. We have no desire to make such an exhibit of overdue interest on a few loans at the end of the present year as we are compelled to at the beginning.

Yours truly,

JOHN E. DE WITT, *President.*"

Q. In whose handwriting is that letter?

A. It is in the handwriting of the clerk of the company at the head office.

Q. Are you familiar with the handwriting?

A. I am; it is the handwriting of a Mr. Cross.

Q. Then in the employ of the company?

A. Yes.

Recross-examination by Mr. SWETT:

Q. Was your appointment in writing?

A. No; I think not originally.

Q. Was there an instrument in writing of any character prescribing your duties or your authority?

A. There was not; none that I recollect.

Q. You have stated in your direct examination that you acted

under instructions in carrying out what was understood to be the general policy and wishes of the company. How were such instructions received?

A. Well, they were received from the president of the company, sometimes by personal interview when he was here or when I was there in Boston and by correspondence.

Q. Had you any authority to make a trade in regard to real estate that should bind the company or to complete any negotiations in regard to real estate without reporting to the company and getting its sanction?

Objected to as incompetent, it not appearing that the complainant had any knowledge of any limitations of the power of the witness.

A. I never understood that I had any special authority to make trades any further than would naturally fall within the scope of the authority of an attorney transacting business for a client.

Q. Did you ever receive any instructions from the company in relation to the agreement, in regard to which you have testified, for the redemption of the two lots involved in this suit? If so, what are they?

Same objection.

A. I don't recollect receiving any instructions except so far as contained in the letters introduced in evidence here.

Q. Was it your custom to make monthly reports of all steps that you took in relation to pending cases and covering the work that you did as attorney for the company?

A. It was my custom to make monthly reports covering in a measure the business transacted by me and the various steps taken in the different matters so far as it was practicable to report such things and so far as I deemed it necessary.

Q. In addition to these monthly reports were you in the habit of writing letters almost daily with reference to the progress of the work in your hands?

A. In the early part of my employment with the company here in Chicago most of the reports were in the form of letters. After I adopted the system of making a monthly report regularly I was not in the habit of writing letters unless some matter of special importance made it advisable to do so or unless I was requested specially to report on some matter, which happened pretty often.

Q. It would be a matter of special importance, would it not, for you to make an agreement such as the one upon which this suit is based, and would you not be likely to report such an agreement either in a letter or in a report to the company?

A. I think if I had ever made such an agreement I should have reported it.

Q. Did you make such an agreement?

A. I never did. I have already testified that I never made any agreement with Kirchoff; that I was only cognizant of an agreement that I understood Mr. Warfield made with him.

Q. Then I understand you to say that you never made any agreement of any kind with Mr. Kirchoff in regard to the lots in question?

A. I never did.

Q. Who made the agreement?

A. Well, I was informed by Kirchoff and by Warfield that the agreement was made on behalf of the company by Mr. Warfield.

Q. Were you present at the time of the making of the agreement?

A. I don't recollect that I was. I have been present when the matter was referred to as an existing agreement, but I don't think I was present when the agreement was made. I don't remember being present when any agreement was made.

Q. Do you know what the terms of that agreement were; and, if so, what is the source of your information?

A. Well, I might say here that I so far took part in the matter of an agreement with Kirchoff as to say that he could buy his property back upon terms to be agreed upon.

150 Q. But you never arrived at any conclusive agreement?

A. I don't think I ever did. I never undertook to agree definitely as to the price or the exact terms of payment; only in a general way gave Mr. Kirchoff to understand that the company would sell it to him the same as they would to any one else.

Q. Going back a little, did you ever report to the company in writing that such an agreement had been made?

A. I don't recollect ever reporting to the company about that agreement until I sent the draft of the deed, and that letter will speak for itself.

Q. Did you ever report to any officer of the company orally that such an agreement had been made?

Objected to as immaterial.

A. I don't recollect.

Q. You had a great many conferences with Mr. Kirchoff in relation to the whole matter?

A. Not a great many; no.

Q. State as briefly as you can the terms of the agreement.

A. The terms of the agreement that I understood to have been entered into were that Kirchoff was to have the privilege of redeeming that particular part of his property upon surrendering the rest of it.

Q. Redeeming it upon what terms?

A. I always understood in a general way that the appraised value put upon it by Mr. Rees was to be the price at which he was to redeem it.

Q. And the appraised value was how much?

A. That appraised value was, I recollect, \$7,000 for the corner lot and \$2,500 for the Pine St. lot.

Q. What were to be the terms of payment?

A. The terms of payment, as I was informed by Mr. Warfield,

were to be one-tenth in cash and the balance, spread over 9 years, in annual or semi-annual installments.

Q. Is it your understanding of the agreement that the price to be paid for the land was \$9,500, which was the appraisement, or \$10,000?

A. I understood it was to be the appraised value.

Q. I understand that all you know about this agreement is that you have heard it alluded to in a general way; that you were never present when it was made.

A. I don't know how many times that agreement was made nor when it was originally made. About the first that I knew anything about it was at the time the arrangement was made with Kirchoff to go and visit the property for the purpose of appraising it.

Q. One of the terms of the agreement to which you alluded was the making of a cash payment, was it not?

A. I so understood it.

Q. Did Mr. Kirchoff ever come to you with the money to carry it out—did he ever make a tender?

A. No, sir; he never did to me.

151 Q. Did he ever express himself as having the money ready to pay it, and from your knowledge of his circumstances at that time and your knowledge of the man do you think he was ready to carry out that contract?

Last part of question objected to as immaterial.

A. There was a time when I supposed from what appeared to be Kirchoff's circumstances that he was able to make such a payment. He always talked as though he could make the necessary payment until the time came for drawing the deed; then he wanted to postpone the payment.

Q. Did he not refuse to make a cash payment at the time the deed was drawn?

A. No; he did not refuse to; he wanted it deferred.

Q. The deed was drawn and delivered to you without any cash payment being made, was it not?

A. Kirchoff's deed?

Q. Yes.

A. There never was any cash payment made that I know of.

Q. And then Kirchoff made a request, did he not, that the company allow him to redeem on long time, making the first cash payment at the end of six months?

A. Substantially that; yes.

Q. Did you understand at the time that there was any definite agreement in regard to both lots?

A. Yes.

Q. You made a draft of a deed and sent it to the company, did you not?

A. I did.

Q. Which has been introduced in evidence?

A. I believe it has.

Q. Was that deed drawn by you for the purpose of carrying out the contract that had been made, as you understood it?

A. It was to that extent.

Q. How did it happen that you included only one lot in the deed?

A. Well, I think I have explained that very fully. I tried to discourage Kirchoff from undertaking the redemption of the two lots and told him that I thought the corner lot there, where his house was, was as much as he was able to take care of and that he had better make an arrangement in regard to that first. I rather overruled Kirchoff, perhaps, in that matter. He wanted a deed covering both, and I told him I would draw a deed first covering the homestead.

Q. Did he consent to it?

A. Yes; he assented to it rather reluctantly, I think; he allowed me to draw up the deed and send it; he understood that I was doing it.

Q. Look at the deed I now hand you from Kirchoff and wife to the Union Mutual Life Insurance Company, which has been introduced in evidence and marked as Exhibit D, and state the date of the record of said deed.

152 A. Nov. 8th, 1879.

Q. You forwarded the draft of the deed from the company to Kirchoff that you had drawn to the company for execution, did you not?

A. I forwarded it to them with a letter which has been produced and read in evidence here.

Q. You received an answer from the company declining to execute the deed and naming a price for which they would sell the property, did you not?

A. I did.

Q. Has that letter been introduced in evidence?

A. It has.

Q. Did you then reply to that letter from the company?

A. I did.

Q. Has your letter been introduced in evidence?

A. It has.

Q. State the date of your reply.

A. Nov. 8th, 1879.

Q. Did you receive any instruction from the company to record the deed from Kirchoff and wife to the company?

A. None that I recollect.

Q. Did you hold the deed in your hands in the nature of an escrow to be delivered to the company when they should fulfill their part of the agreement, as you understood it?

A. I don't think I held it exactly in the nature of an escrow. I think I stated the matter somewhat in this way to Kirchoff at the time, that I would take his deed, and I would write the company in regard to the conveyance back to him, and that in the meantime I would not put his deed on record nor take any advantage of him, intending to keep the matter open, so far as I can recollect now

about it, until he had settled definitely the terms of his contract with the company, if he had any.

Q. If it was your understanding that the matter was still open at the time you received the letter from the company refusing to execute the deed, and if you received no instructions from the company to have it recorded, why did you not hand the deed back to Kirchhoff and wife instead of having it recorded?

A. I think I sent for Kirchhoff on receipt of that letter. I know I had an interview with him after the receipt of the letter—very soon after and very likely on the same day—and I think I tendered Kirchhoff his deed back again or at least I gave him the opportunity to withdraw the deed if he didn't wish to deliver it, but he concluded to deliver the deed, insisting that he had a contract and would stand on his agreement with the company. I know I never recorded that deed without having an understanding in reference to it, and I don't think it was recorded by mistake.

Q. Is the answer to this question based upon an independent recollection of the facts or upon reasoning at the present time upon what must have been from what occurred?

A. I don't recollect everything in connection with the matter. I do recollect having the interview with him in my office and discussing with him the company's letter refusing to make the conveyance to him, and I do recollect that he insisted that he had an agreement with the company, and it is my best recollection that I told him that he could withdraw that deed if he wished to, and I do recollect that he didn't withdraw the deed.

Q. Subsequent to this time you, as the attorney of the Union Mutual Life Insurance Company, proceeded to perfect the foreclosure of that trust deed, did you not?

A. I did.

Q. Did Kirchhoff make any defense to that suit?

A. No; he did not; it went by default, so far as he was concerned or Mrs. Kirchhoff.

Q. He had notice of the proceedings and frequently talked with you in regard to them, did he not?

A. He had notice, because there was service of process on him, subpoena from the United States circuit court. He knew of the pendency of the suit. I don't know that he frequently talked with me about it. I don't think he did talk much about the suit.

Q. As a part of the proceedings in that suit, did you ever take any steps toward ejecting Kirchhoff from the property?

A. I don't think I ever did. I don't think I ever initiated any proceedings to eject him.

Q. Were you ever instructed by the company or Mr. Warfield to eject him from the property?

A. I think I was requested by Mr. Warfield to get possession for him, as receiver, of the property occupied by Kirchhoff because he had failed to pay rent stipulated in his lease, and I think I intended to have done so, but I don't think I ever got as far as to make any application to the court for assistance in the matter.

Q. Did Kirchoff ever inquire of you why you were proceeding with the foreclosure?

A. Yes; he did on one occasion.

Q. What did you tell him?

A. I told him that certain complications in the title that I had discovered since the delivery of his quitclaim deed pertaining to the homestead lot made it necessary, in my opinion, to proceed with the foreclosure, get a decree, and have it sold.

Q. Was any reference made to this agreement at that time?

A. Well, yes; I think Kirchoff had something to say about his buying back that property, with reference to the effect the foreclosure proceedings would have. I didn't discuss that matter much with him. I think I told him that it wouldn't make any difference. I recollect explaining to him that in any event it would be better for the title that it should be foreclosed in that way, to get rid of this intervening incumbrance, and that until that was done the company could not give a good title to it nor take a good title back under a mortgage. There were other reasons influencing me to proceed with the foreclosure, but I don't think I explained to him, because I didn't think it was necessary nor useful. The defect in the title to this homestead lot was what necessitated the
154 amendment to my foreclosure bill by making Runyan and his assignee in bankruptcy and Stanford, who purchased at sheriff's sale, parties.

Q. You say you told him at the time that the foreclosure would have no effect on the bargain that had been made?

A. I think I told him substantially that.

Q. And did you give him the idea at the time that the foreclosure proceedings would improve the title, and that it would be for his benefit as well as for the company?

A. I did in the event that he became the purchaser.

Q. This was subsequent to the time that you had received the letter from the company repudiating the bargain, was it not?

A. Yes, sir.

Q. In all these foreclosure proceedings Mr. Kirchoff never took any part—just let them go by default?

A. He did.

Redirect examination by Mr. HARBERT:

Q. Did your connection with the company terminate previous to the application for a writ of assistance?

A. It did.

Q. Were you present at any conversations between Mr. Warfield and Mr. Kirchoff when the matter of the application of the rents from the property was talked over?

A. No.

ROBERT B. KENDALL.

Mr. GROSSCUP: This testimony with reference to the agreement with Kirchoff all goes subject to objection, of course?

Court: Yes.

Continuation of Master's Report.

JUNE 11TH, 1885—2 o'clock p. m.

Present: W. S. Harbert, Esq., on behalf of the complainant;
Edward R. Swett, Esq., on behalf of the defendants.

CHARLES KLEIN, a witness called on behalf of the complainant herein, having been first duly sworn, was examined in chief by Mr. Harbert and testified as follows:

Q. Please state your name, age, place of residence, and occupation.

A. Charles Klein; 211 West Van Buren street; 35 years of age; tailor's clerk.

Q. Do you know Julius Kirchoff?

A. Yes, sir.

Q. Were you in his employ in about 1878?

A. Yes, sir.

Q. Where was Julius Kirchoff doing business in 1878 or at the time you speak of?

A. 122, '24, '26, '28 Clark street.

155 Q. In Chicago, Cook county, Illinois?

A. Yes, sir.

Q. In what capacity were you employed by him?

A. I was bartender and collector.

Q. What business was he running there at that time?

A. Saloon and bottling-beer business.

Q. Do you know E. A. Warfield and Robert B. Kendall or either of them?

A. Yes, sir.

Q. Both of them?

A. Yes, sir.

Q. Were you present at any conversation which occurred about the time you have mentioned, at which Mr. Warfield, Mr. Kendall, and Mr. Kerchoff were present?

A. Yes, sir.

Q. Where did that conversation occur?

A. Basement of 126 Clark street.

Q. What time of the day was it?

A. Some time in the afternoon.

Q. Now, please state all that you remember that was said by either of these parties in that conversation.

A. This is the way it was: I was called in there to see one of the gentlemen that was sitting down in there—to see one of the gentlemen that was sitting down in the back part of the office—and they was talking about some business matters, and I overheard Mr. Warfield say, "I am glad to say the thing is settled and you are satisfied and we are satisfied," and then they talked about—in regard to the homestead, and Kirchoff said—or Warfield, I meant to say—"It is satisfactory to you and satisfactory to us, and I am glad the thing is settled, and you will retain your homestead at the valuation of

what it is worth at the present time," or "what it is worth." I don't know whether they used the word- "at the present time" or not.

Q. Was there anything said at that conversation about any deeds?

A. As far as deeds is concerned, I couldn't answer you, but, as far as I could understand from the conversation they had there—I was there a little while—the homestead was his; belonged to him and his wife.

Q. Was anything said that you remember concerning Kirchoff and his wife making a conveyance to the company of the other property, or the property in a mortgage or trust deed?

Objected to by defendant as leading.

A. That I couldn't say, because I wasn't there during the whole conversation.

Q. What, if anything, was said by Mr. Kirchoff in reply to what you have said Mr. Warfield said?

A. Well, gentlemen, let's go and take a drink on it. I am satisfied, and so are you satisfied.

156 Q. Was anything said, so far as you remember, about any reason given by Mr. Kirchoff why he wished to retain the homestead?

Objected to by defendant as leading.

A. He says, If everything is lost, I have got a home for myself and wife, anyway. That belongs to us.

Q. Do you know where Mr. Kirchoff's homestead was at that time?

A. Corner of Rush and Pearson streets.

Q. In the city of Chicago and county of Cook?

A. Yes, sir.

Cross-examination.

By Mr. SWETT:

Q. When did this conversation to which you refer take place?

A. About seven years ago.

Q. In what month was it?

A. Oh, I couldn't exactly tell you the month, but I know the circumstance happened about that time; that is all.

Q. What year was it?

A. In '78, of course.

Q. Give us as near as you can what month it was.

A. It was either August or September—the latter part of August or fore part of September—I think.

Q. You are positive in regard to the time—that it was just about that time?

A. I think it was about that time.

Q. Did you ever see Mr. Kendoll and Mr. Warfield at any other time?

A. Oh, I have seen the gentlemen several times.

Q. Where did you see them?

A. I seen Kendall on the street and I seen Warfield on his office and on the street.

Q. Did you ever see them in there any other time?

A. Where?

Q. In the saloon.

A. Oh, yes.

Q. How many times do you think you saw them in the saloon?

A. Oh, seen Kendall dozens of times, and I seen, probably, Mr. Warfield the same amount of times.

Q. Were they in the habit of going in there for their dinner?

A. I am not positive about Mr. Kendall, but I am positive that Mr. Warfield had dinner there.

Q. You say you were bartender there. Did you stand behind the bar?

A. Part of the time and part of the time outside.

Q. Was it your business to go to a customer and take his order and then go and get the food and the drinks, whatever it was he ordered?

157 A. Not in the saloon. I done it several times in case of necessity.

Q. You did it in this case?

A. I did it in that case. I was downstairs in the office in regards to my collection.

Q. That is, collecting for what they ate and drank?

A. What is that?

Q. You went in there to collect for what they ate and drank?

A. Oh, no. I had business various times with the book-keeper in regard to my collections that I had to do outside for Mr. Kirchhoff—the bottled-beer business.

Q. Was the book-keeper down there?

A. Yes.

Q. At that time?

A. I don't know whether he was or not; his office was there, and I used to keep my bills and papers down there and my clothes.

Q. What was it you went in there for on this occasion?

A. I think it was to find out something about my collections; there was some parties come there about my bills and they had come to the office and paid.

Q. Who was it that you were going to find this out from?

A. The book-keeper.

Q. Was the book-keeper there?

A. I presume he was; he was around the house somewhere.

Q. Do you remember any conversation that you had with the book-keeper?

A. All the conversation I could have with him was as regards the business. I would merely ask him if there was any parties there to pay any bills while I was out; my habit used to be if a man wasn't in to leave the bill.

Q. How long did you stay there in the office?

A. I stayed there, you might say, half an hour; I was in and out several times.

Q. Did you talk with these gentlemen yourself?

A. Did I talk with them on that occasion?

Q. Yes.

A. I had no business to; no, sir; just waited on them as they told me to bring a bottle of wine, and I brought it and they drank it. The conversation was carried on; I couldn't very well help hearing them, because I was standing right there.

Q. Did you wait on anybody else during that half hour?

A. Not that I know of.

Q. Any other customers?

A. Down there, or in the whole establishment?

Q. Yes.

A. I may have; yes.

Q. Do you remember distinctly whether you had or not?

A. Yes; I suppose I waited on somebody else besides them.

Q. What was your business—to make yourself useful around and wait on people, was it not?

A. Yes, sir.

Q. What impressed this particular conversation on your mind?

158 A. Because it was a kind of novel table that they had there; it was a half beer barrel standing on the floor, and they was drinking and would put their glasses on there. I was going to put the glasses on the desk, and Mr. Kirchoff says, "Lay them on here; this is good enough."

Q. Were you ever present at any other conversation between the same gentlemen?

A. Yes, sir; several times.

Q. In the saloon there?

A. Oh, they might be standing at the bar, talking.

Q. Do you remember what they said?

A. Well, yes; in some respects.

Q. Give the substance.

A. Oh, talking about business matters.

Q. Give it with the distinctness that you have given this conversation.

A. Oh, Mr. Warfield might come into the saloon there and Kirchoff say, "How is business?" or something like that.

Q. I want to know what they did say. State what they said at any other conversation.

A. Well, they may have come in there and spoken on a general kind of business way by themselves or something of that kind.

Q. I want to know what they did do, not what they may have done. You have spoken of exactly what they said in this conversation, and you said the way it was impressed on your mind was because they had half a beer barrel for a table. Give some other conversation with equal distinctness, if you can.

A. I used to wait on the parties, and, of course, they would have a little conversation—just a matter of a little business conversation.

Q. They came in there frequently and took their dinner, didn't they?

A. Mr. Warfield—I have seen him there several times, taking his dinner there.

Q. And you would be around there when they were eating?

A. Oh, no; that would be outside of my business. I don't know that I ever waited upon Mr. Warfield—that is, to fetch him his dinner or anything like that.

Q. State again what was said in this conversation.

A. In what conversation?

Q. The one you have testified to here when they drank off the beer keg.

A. Kirchhoff or Warfield said, "Mr. Kirchhoff, are you perfectly satisfied with the arrangements we have made? We are both perfectly satisfied," and Kirchhoff said, Yes, and Mr. Warfield said, Yes, or something to the same effect.

Q. Do you know what arrangements they referred to?

A. Yes; regarding their property, and, as far as I could surmise, it was as regards their property, and Mr. Kirchhoff was to retain the homestead.

159 Q. What else was it that you heard that you drew your surmises from?

A. They was talking about the property every day or two. Of course, I had a little idea that that was what they was doing, and that was what put it into my head to listen to it; that was all. I was a little inquisitive.

Q. You don't know what the agreement was?

A. In what respect?

Q. What was the agreement?

A. The agreement was that Mr. Kirchhoff was perfectly satisfied and Mr. Warfield was perfectly satisfied, and they was talking about there property. I know they was talking about property at the time.

Q. What was it they were satisfied about?

A. Mr. Warfield says, "Kirchhoff, you are satisfied with the agreement we have made now and I am satisfied."

Q. What was the agreement?

A. That I can't say exactly. I don't know.

Q. Has any one talked to you about this matter from that time to this?

A. No; I only happened to meet Mr. Kirchhoff, and I told him I recollected about the case because some other parties told me that he had a big lawsuit.

Q. When was it you met Mr. Kierchoff?

A. I have not met Mr. Kierchoff now in four or five months, until three or four days ago.

Q. What was said when you met three or four days ago?

A. He asked me to come downtown.

Q. What did he want you to do?

A. He asked me if I recollected about that. In fact, I commenced myself. I was on Van Buren street, and he happened to see me

sitting in front of the house, and I dressed myself (I was working at the time) and changed my clothes, and I went down as far as Halsted with him, and I said, Kierchoff, how are you getting along with that suit of yours? And that is the first time Mr. Kierchoff spoke to me about it.

Q. Do you know what he came up to your place for?

A. I don't know that he came up to see me; he came up to the house there and spoke to me.

Q. You say that he told you he wanted you to come downtown?

A. He says, I will see you downtown some time; and he says, "When will you be down?" And I says, "I will be down every day." I told him I would see him some time Monday, I think it was, and he was not there, so I went about my business again.

Q. How does it happen that you are here now?

A. Because I came down to see if he wanted to see me for anything, because I wanted to change my business, and Mr. Kierchoff is around a great deal, and in case Mr. Kierchoff should happen to hear of anything he might tell me about it.

Q. Didn't he tell you anything about coming here?

A. Coming here?

160 Q. Yes.

A. No, sir.

Q. Then you didn't know that you were coming here until a few minutes ago?

A. Until I went up to Mr. Harbert's office.

Q. How did you happen to go there?

A. Mr. Kierchoff told me he would tell me where I had to go to.

Q. Hadn't you talked to Mr. Kierchoff about what you were going to say?

A. What I was going to testify to? No, sir.

Q. Did you talk with Mr. Harbert any?

A. Yes, sir; I told him what my testimony might be or would be.

Q. But that is the first time you knew of it, when you went up to Mr. Harbert's office?

A. That I was going to testify here?

Q. Yes.

A. Yes, sir.

Redirect examination.

By Mr. HARBERT:

Q. Please describe the place where the conversation occurred, as to whether it was in the main eating-room or in a separate place.

A. 122 and 124 Clark street was a rest-urant and saloon, and right at the corner was a little entrance went down about four or five steps; then there was a bottling establishment and wine-room and ice-house back of that. Under the sidewalk was where the conversation happened.

Q. Is the office there?

A. Well, no; the private office is in 124 Clark street. The book-keeper's office was there.

Q. Was this place where the conversation was had a private, retired place or a public place?

A. Private and retired. I don't understand exactly what you mean.

Q. Was it in the middle of a crowd where other customers were frequenting or was it substantially by itself?

A. As regards that, all the customers in the house could go in there. Nobody went down there except parties that wanted to order bottled beer or wine or something like that or had business with the book-keeper.

Q. Then it was rather a retired place?

A. Rather retired, you might say.

Recross-examination.

By Mr. SWETT:

Q. Where was it this conversation occurred?

A. Where the beer barrel was?

Q. Yes.

A. 126 Clark street.

161 A. What part of the room?

A. Back of the book-keeper's office.

Q. Where was the book-keeper's office?

A. In front of where they were talking.

Q. In what part of the basement were you talking?

A. Well, I should say about the front part of the office.

Q. The front part of the office?

A. Yes, sir.

Q. Was it under the sidewalk?

A. Well, I called it under the sidewalk. There was a glass screen right over—a bull's-eye was right over.

Q. People walking right over your heads?

A. They could walk over it; yes, sir.

Q. Was that where the book-keeper's desk was at that time?

A. Just a little front of where the conversation happened.

Q. Was the book-keeper's desk under the sidewalk, too?

A. Oh, no; just a little this side of the bull's-eye. It is an iron sidewalk with these little glasses in.

Q. You were in the habit of overhearing a great many conversations every day, were you not, of people who came in—hundreds of them every day, didn't you?

Objected to by plaintiff as not proper recross-examination.

A. Oh, I was just staying there, and had nothing else to do and couldn't very well get away and couldn't help but hear.

Q. (Question repeated.)

A. No, sir; I wouldn't have time to stand around and hear a hundred conversations in a day.

Q. Can you remember any other conversation that occurred that day between any parties in that saloon?

A. Between them parties?

Q. Between any parties, no matter who.

A. Well, you see I can't exactly set the date when this conversation happened. I can come pretty near what time it was, but I can't state the exact date when the gentlemen had the conversation there; all that refreshes my mind is when they drank on that beer keg there—

Q. As I understand it, all that you remember that they said was that they were glad some matter was closed up; that they were both satisfied, and that Kierchoff proposed that they take a drink over it. That is about the substance of what you heard, is it?

A. Mr. Warfield said, "Mr. Kirchoff, you are perfectly satisfied with the way this thing is settled now?" and Mr. Kirchoff said, "I am, and I suppose you are, too."

Q. And that is all you heard?

A. Mr. Warfield said, "Now everything is satisfactory, and it is O K."

Q. That is all you heard?

A. Yes, sir—that is, with the exception of what he spoke about his homestead.

Q. What did he say about that?

162 A. He said, "That homestead is mine and belongs to my wife and I."

Q. He said it was his, did he?

A. Well, "It belongs to my wife and I."

Q. You are perfectly certain about that, that he said it was his, and that it belonged to himself and wife?

A. Well, something to that effect. I couldn't exactly tell you the exact way it was said.

Q. But you are as certain of that as you are of the other?

A. As certain of what?

Q. You are as certain of what he said about the homestead as you are about being satisfied that the thing was closed up?

A. That Mr. Kierchoff was satisfied and Mr. Warfield was satisfied?

Q. I say you are as certain of one thing as you are of the other that was said there?

A. What I told you—I am certain what I did say.

Q. Now, state what you understand the agreement to be.

A. I wasn't there to any agreement.

Q. And you didn't hear them say what the agreement was?

A. No, sir.

Q. But you understood that Kierchoff owned the homestead?

A. He says, "That will be left to me and my wife" or "my wife and I." That was the word he used. He always used Mrs. Kierchoff's name before himself.

Q. Nothing was said about whether he was to pay any money?

A. Oh, yes; he was to get the property for what it was worth. "You pay me what it is worth now," that was what Warfield said, "and you will get it back and then it is yours," they said; that was the words used, and after that I was always under the impression

that the place was his, after I went to work for him on the North side again.

Q. What you have testified to already is all that was said, is it?

A. All of my recollection that I can think of.

Q. Was anything said about what it was worth?

A. Not in my presence.

Q. You said something awhile ago about a valuation?

A. I did.

Q. What was said about it?

A. Well, "You pay me" or "Pay us what it is worth and it is ours" was what was said. At the time the way they spoke I couldn't exactly get all the words that they used, but I get it as near as I can possibly think of.

Q. Is it not a fact that you have a very indefinite recollection about this whole thing?

A. I don't know why.

Q. What did Mr. Kierchoff tell you he wanted you to go to Harbert's office for?

A. I happened to meet Mr. Kierchoff and he said, "Come and take a drink with me and come to Harbert's office with me."

63 Q. When was this?

A. This forenoon.

Q. You just happened to meet him?

A. Just happened to meet him.

Q. Nobody told you that they were going to take a deposition today?

A. No, sir.

Q. Where did you meet him?

A. On the North side.

Q. Where on the North side?

A. In a saloon.

Q. Where was this saloon?

A. On North Clark street.

Q. What were you over there for?

A. Me? I go all over town.

Q. You live on the West side, don't you?

A. I live on the West side.

Q. What were you doing over there?

A. Going around to see friends. I want to get into the saloon business again, and, of course, it is natural for me to go around among saloons.

Q. You didn't know that Kierchoff was going to be there?

A. No; he didn't promise to be there; no.

Q. Did you have an arrangement to meet him there?

A. No, sir.

MR. JULIUS KIERCHOFF: They all know that I go there every day.

Q. Now, Mr. Kline, notice was served on me three or four days ago that they were going to take a deposition here today, and I understand you to say that you knew nothing of it; that you live over on the West side, and you accidentally happened to go onto the North

side and met Mr. Kierchoff in a saloon without knowing that you were going to meet him there.

A. Yes, sir.

Q. And that Kierchoff suggested that you go up to Harbert's office, and then you arranged to come over and take this deposition.

A. Yes, sir.

The whole question objected to as argumentative, leading, and as intending to raise a false presumption that notice was served that the deposition of this witness should be taken.

Q. What time this morning were you at Mr. Harbert's office?

A. Half past twelve, quarter to one.

Q. And what time were you told to be at the master's office to give your deposition?

A. I didn't know where I was going; didn't know whether it was a master's office or not. Mr. Kierchoff told me he would like to have me come over here.

Q. What time did you get here?

A. You seen me coming in there.

164 Q. What time of the day was it?

A. It must have been about a quarter past two.

CHAS. KLEIN.

Adjourned.

Mrs. ELIZABETH KIERCHOFF, being first duly sworn by the master, testified as follows:

Direct examination by Mr. HARBERT:

Q. State your name, age, and place of residence.

A. Mrs. Elizabeth Kierchoff; about 47 years of age; 525 North Clark street, Chicago, Illinois; I am the complainant in this suit.

Q. Is Julius Kierchoff your husband?

A. Yes, sir.

Q. What do you know of the defendant, the insurance company—

A. I authorized my husband to do all my business with that company.

Q. Had you borrowed some money from that company?

A. Yes, sir; on the land, on the real estate.

Q. Was your husband your agent?

A. Yes, sir.

Q. What authority did he have to act for you as agent? Now, tell what you told him he might do.

A. To do just the best for me. We wanted him to make the best arrangement he could, but to save the homestead for me in any event.

Q. Did he make the arrangement; and, if he did make any, what arrangement did he tell you that he had made?

A. He told me that we had to sign over all what we had to the

the company, and that was the time when I told him to do the best he could to save the homestead for me, and then to pay one thousand dollars as soon as the papers would come, and then after that to pay the thousand dollars until we paid ten thousand dollars, every year a thousand dollars until we had it paid off.

Q. Were you to pay any interest on that?

A. With interest; yes, sir.

Q. Was that before you signed the deed?

A. Yes, sir; before we signed the deed, because I would not have signed the deed if it had not been that-I did wish my husband to keep the homestead for me.

Q. You would not have signed the deed, then, if you had not expected to retain the homestead?

A. Yes, sir; to keep it.

Q. What excuse, if any, was given you as to why the company did not give you the homestead as agreed to?

A. It was, if he should sign it over to them it would be better for us, but I think if he had kept it in our hands we would have done better for ourselves. We could have made a great deal more money out of it.

Q. You could have paid the debts and kept the homestead?

165 A. Yes, sir; we could and keep the homestead also.

Q. Would you have made the deed if you had not expected and understood that you would get back your homestead?

A. I would not; of course not.

Q. What do you mean by the homestead?

A. I mean the lot on the corner of Rush and Pearson and one on Pine street. It is now Water Tower place, but it was Pine street at that time.

Q. Do you remember of your husband and Mr. Warfield and Mr. Kendoll and Mr. Rees coming to your house at one time?

A. Yes, sir; I remember that.

Q. What did they say to you at that time about what they were going to do about your matters?

A. When they came there my husband told me all what it was for. It was on account of appraising the land to make out this deed to the company according to the contracts we made with them.

Q. Did they appraise the house then; and, if so, at how much, do you remember?

A. It was then two lots, ten thousand dollars.

Q. Were you always ready and willing to carry out your part of the agreement that your husband had made for you?

A. Oh, yes, sir; I was.

Q. Why did you make or sign the deed to the company? Tell it again.

A. It was so I could preserve the homestead.

ELIZABETH KIERCHOFF.

Subscribed and sworn to before me this 30th day of January,
A. D. 1886.

ARNO VOSS,
*Master in Chancery of the Circuit Court
of Cook County, Illinois.*

And the complainant then rested.

And the defendant thereupon read the deposition of John E. De Witt, which is in the words and figures following :

Stipulation.

STATE OF ILLINOIS, }
Cook County, } ss :

In the Circuit Court for said County.

ELIZABETH KIRCHHOFF }
vs. }
THE UNION MUTUAL LIFE INS. CO. }

It is hereby stipulated that the deposition of John E. De Witt and E. R. Seccomb may be taken before Fred. V. Chase, a notary public in the city of Portland and State of Maine, instead of before Josiah H. Drummond, Jr., to whom a dedimus has been already issued.

It is also stipulated that the cross-interrogatories hereto 166 attached may be attached to the said dedimus, and the said John E. De Witt and E. R. Seccomb required to make answer thereto, the clerk of the circuit court having failed to attach the said interrogatories to the said dedimus, though the same were on file.

All informalities in taking this deposition are hereby waived, together with notice and affidavit required by statute.

Compl't reserving the right to object to the interrogatories and answers on the hearing for immateriality, incompetency, or irrelevancy or because not responsive.

W. S. HARBERT, *Sol. for Complainant.*
SWETT, HASKELL & GROSSCUP,
Sol's for Defendants.

Deposition.

The deposition of John E. De Witt, of Portland, of the county of Cumberland and State of Maine, a witness of lawful age, produced, sworn, and examined upon his corporal oath on the fourth day of May, in the year of our Lord one thousand eight hundred and eighty-five, at the office of the Union Mutual Life Insurance Company, in the city of Portland, in the county of Cumberland and State aforesaid, by one Fred. V. Chase, a notary public in and for the county of Cumberland and State of Maine, duly chosen by stipulation hereto attached instead of Josiah H. Drummond, Jr., a commissioner duly appointed by a *dedimus potestatem* or commission issued out of the clerk's office of the circuit court of Cook county, in the State of Illinois, bearing teste in the name of Henry Best, Esq., clerk of said circuit court, with the seal of said court affixed thereto, and directed to the said Drummond as such commissioner for the examination of the said John E. De Witt, a witness in a certain suit and matter in controversy now pending and undetermined in said circuit court, wherein Elizabeth — is plaintiff and The Union Mutual Life Insurance Company is defendant, in behalf of the said Union Mutual Life Insurance Company, as well upon the cross-interrogatories of the plaintiff as upon the interrogatories of the defendant, which were attached to said commission, and upon none other.

The said JOHN E. DE WITT, being first duly sworn by me as a witness in the said cause previous to the commencement of his examination to testify the truth as well on the part of the plaintiff as the defendant in relation to the matters in controversy between the said plaintiff and defendant as far as he should be interrogated, testified and deposed as follows :

Interrogatory 1st. State your name, age, occupation, and place of business.

Answer to first interrogatory. John E. De Witt; forty-five; president of the Union Mutual Life Insurance Company, Portland, Maine.

Adjourned to May 5th, 1885, 10 a. m.

F. V. C.

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MAY 5TH, 1885—10 a. m.

Met according to adjournment.

F. V. C.

Int. 2d. Do you know the parties to this suit, and what relation, if any, do you bear to them or either of them?

Answer to 2d Int. I am president of the Union Mutual Life Insurance Company. I am not, to my knowledge, acquainted with the plaintiff, Elizabeth Kirchhoff. Years ago I met Julius Kirchhoff.

Int. 3. How long and in what capacity have you been connected with The Union Mutual Life Insurance Company, the defendant in this cause?

Ans. to 3d Int. I have been president of the company since July, A. D. 1876.

Int. 4th. State, if you know, what, if any, business relations the complainant, Julius Kirchhoff, or his wife, Elizabeth Kirchhoff, have had with the Union Mutual Life Insurance Company.

Ans. to 4th Int. I know of no relations except as borrowers of money of the company secured by a mortgage of real estate.

(Int. 5th. What, if any, agreement was made with the said complainants relative to a settlement of the indebtedness of said complainants to the defendant by which the said indebtedness should be canceled?)

Int. 5th. If you say that the complainants borrowed money of the Union Mutual Life Insurance Company, giving a mortgage therefor, state fully the history of the transaction.

Ans. to 5th Int. The loan was made before my connection with the company. I find by reference to the real estate and mortgage book of the company that a loan of sixty thousand dollars was made on May 8th, A. D. 1871, to Elizabeth Kirchhoff and others, and that L. D. Boone, S. S. Boone, and William Hansborough was named as trustees in what, I presume, was a trust deed; and I find also that as additional collateral security there was a note of one Redeling for \$1,500, the payment of which was conditioned upon the title of other property being made good to him, out of which we finally collected \$920, and from this amount we paid six dollars for abstract of title and credited the next to the account of the mortgage.

Int. 6th. What, if any, agreement was made with the said complainants relative to a settlement of the indebtedness of said complainants to the defendant by which said indebtedness should be cancelled?

Ans. to 6th Int. An agreement was made to take all of the property mortgaged, except one tract of a few acres, and cancel the debt.

Int. 7th. State, if you know, what relation Robert B. Kendall and E. A. Wanfield bore to the Union Mutual Life Insurance Company and during what time did such relations exist?

168 Ans. to 7th Int. When I was elected president Mr. Wanfield — employed in the insurance agency department, and, as I recollect, in the fall of A. D. 1876, was transferred to Chicago to look after our real estate and mortgage loans under a written contract, the original of which is lost, a copy of it being, as I understand, in the hands of our counsel at Chicago. I believe that it was in the summer of A. D. 1880 that we dispensed with his services. Kendall was employed at the time I was elected president at the home office to look after the legal matters of the company, and was transferred to Chicago to perform the same duties about the same time that Warfield was. His services were dispensed with by the company in January, A. D. 1881.

Int. 8th. State, if you know, the scope of the authority of the said R. B. Kendall and E. A. Warfield to make trades, contracts, and agreements in regard to the real estate of the Union Mutual Life Insurance Company in Cook county, Illinois.

Ans. to 8th Int. They had no authority to make trades, contracts, or agreements for our company.

Int. 9th. State, if you know, what the instructions of the defendant were to the said Robert B. Kendall and E. A. Warfield in regard to reporting the business done by them to the defendant.

Ans. to 9th Int. Their instructions were to report all propositions made to them relative to our real estate and real-estate loans to the home office for the consideration and decision of the finance committee.

Int. 10th. What was the custom of the said E. A. Warfield and Robert B. Kendall in regard to making such reports?

Ans. to 10th Int. It was their custom to follow their instructions, as stated above.

Int. 11th. Was it the custom of the company, upon receiving the said report, to instruct the said E. A. Warfield and Robert B. Kendall in relation to the matter therein contained?

Ans. to 11th Int. It was.

Int. 12th. Had or had not the said E. A. Warfield and Richard B. Kendall authority from the said company to complete negotiations in regard to the settlement of mortgages or to sale of real estate belonging to the company without submitting said negotiations to the said defendant?

Ans. to 12th Int. They had not.

Int. 13th. Did you or either of you ever authorize the said E. A. Warfield or the said Robert B. Kendall to make any arrangement for the redemption of the property involved in this suit by the said Kirchhoff?

Ans. to Int. 13th. I did not, and Mr. Seccombe ceased to be superintendent of loans Aug. 1st, A. D. 1878, which I believe antedates the claim of the plaintiff in this suit.

Int. 14th. What proportion of the time did you spend in the city of Chicago between the year 1876 and the — 1881?

Ans. to Int. 14th. I cannot answer exactly, but I think that fully a year of that time was spent in Chicago.

Int. 15th. During such visits to Chicago did you frequently see Julius Kierchhoff or his wife, the complainant in this cause, and talk with them in relation to their indebtedness to the defendant?

Ans. to 15th Int. I probably saw Julius Kerchhoff three or four times. I do not recollect ever having seen Mrs. Kirchhoff. I talked with Mr. Kirchhoff about paying off the mortgage.

Int. 16th. During such conversation what, if anything, was said by the said Kirchhoff or by you or by the said Robert B. Kendall or the said E. A. Warfield in your presence with relation to an agreement for the redemption of the property involved in this suit by the Kirchhoffs?

Ans. to 16th Int. I have no recollection of having any conversa-

tion with either of the Kierchoffs about an agreement for such redemption, nor have I any recollection of discussing the matter in the presence of the Kierchoffs and either Kendall or Warfield, or of our being present when it was discussed by Kendall and Warfield or either of them with the Kerchoffs.

Int. 17th. Did you frequently have conversation with the said E. A. Warfield and Robert B. Kendall with relation to the indebtedness of the said Kirchhoff to the defendant? If so, what, if any thing, was said at such conversation with relation to an agreement entered into by them as agents for the defendant for the redemption by the Kirchhoffs of the property involved in this suit?

Ans. to 17th Int. I had frequent conversations with Warfield and Kendall about the Kirchhoff indebtedness, but never any conversation with relation on agreement entered into by them as agents for the defendant for the redemption of the property involved in this suit until after a letter and proposed deed to the Kirchhoffs had been sent by Kendall to the company and declined by them.

Int. 18th. State when it first came to your knowledge that the said Warfield and the said Kendall or either of them had made or pretended to have made an agreement as agents of the said company for the redemption by the Kierchoffs of the said property.

Ans. to 18th Int. It first came to my knowledge by a letter dated November 1st, A. D. 1879, from said Kendall enclosing a proposed deed to the Kirchhoffs which the company declined to execute.

Int. 19th. Do you know any other matter or thing of benefit or of advantage to the defendant in the above-entitled cause? If so, state the same as fully and explicitly as though expressly interrogated in relation thereto.

Ans. to 19th Int.—

(Adjourned to May 6th, 10 a. m. F. V. C.)

(May 6th, 10 a. m., met according to adjournment. F. V. C.)

I know that neither Mr. Kendall nor Mr. Warfield had any authority to bind the company in any way in connection with their real estate or real-estate loans in Chicago. They were only authorized to receive propositions from parties and forward them to the company for the consideration and decision of the finance committee of the company, and after such decision to carry out the instructions they received from the company in regard thereto.

170 *Cross-interrogatories and Answers Thereto by the Witness on the Part of the Plaintiff.*

Cross-int. 1st. Please state, if you know, whether or not E. A. Warfield held himself out or was held out by the company as the financial agent of the company for the Northwest.

Ans. to cross-int. 1st. I understand that he held himself out as the financial agent of the company at Chicago, and the company considered him as their financial agent, as stated in my answers to interrogatories 7th and 19th.

Cross-int. 2nd. Did not R. B. Kendall hold himself out or was he not held out by the company as its general legal adviser and the manager of its legal business in the Northwest?

Answer to cross-int. 2nd. We do not know how Mr. Kendall held himself out. We considered him our general legal adviser in Chicago, as more fully appears in my answer to interrogatory 19th.

Cross-int. 3rd. Please attach to your deposition as exhibits the printed portion of the style of letter-heads used by E. A. Warfield and Robert B. Kendall, respectively, while they were in the employ of the defendant company.

Ans. to cross-int. 3rd. I attach them herewith, marked "Exhibit A, F. V. C., May," "Exhibit B, F. V. C., May," "Exhibit C, F. V. C., May."

EXHIBIT A, F. V. C., May.

Union Mutual Life Ins. Co., No. 133 La Salle street, room 15; E. A. Warfield, financial agent.

CHICAGO, ILL., Jan. 29th, 1877.

Union Mutual Life.

GENTLEMEN: President's favor of 24th inst. relative to loans 1729 & 1826, Pettingill, received.

Will say that the interest due on these loans was paid the 23d inst., the day after I wrote you concerning the same. Referring to Sup't Secomb's letter of 23d inst. in regard to our letter-heads, will say that I have had the "financial department" cut off, which takes off the officers' names. Shall I use them as they are or get a new edition? I have only 500 sheets of each size.

Yours truly,

E. A. WARFIELD, *Ag't.*

EXHIBIT B, F. V. C., May.

Union Mutual Life Insurance Co., 133 La Salle street, room 15.

John E. De Witt, president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

CHICAGO, ILL., Feb. 4th, 1878.

'2, 6, '78.

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EXHIBIT C, F. V. C., May.

Union Mutual Life Insurance Company.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

NO. 133 LA SALLE STREET,

CHICAGO, ILL., June 3d, 1879.

6, 9, '79.

Cross-int. 4th. Did not E. A. Warfield succeed Levi D. Boone as the financial agent of the defendant company in the Northwest?

Ans. to cross-int. 4th. I have already stated the scope of Mr. War-

field's authority in my answer to previous interrogatories. He did not have the authority that Boone had.

Cross-int. 5th. Did the defendant company, at the time E. A. Warfield was in the employ of the company, have any one as its financial agent at Chicago other than said Warfield?

Ans. to 5th cross-int. I was there at times. Daniel Sharp, the vice-president of the company, was there from time to time, and E. R. Seccumb, for a time superintendent of loans of the company, was there occasionally. All of us, when there, gave special attention to the financial affairs of the company in Chicago.

Cross-int. 6th. Was not Daniel Sharp vice-president and a director of the company for some years previous to his death, and did he not during the period the Kirchhoff business was pending visit Chicago several times in relation to the company's business at Chicago?

Ans. to 6th cross-int. Yes.

Cross-int. 7th. If you say you were frequently in Chicago while Mr. Warfield was the financial agent of the company, please state whether or not you had frequent interviews with him while you were in Chicago, and whether or not you and he conferred together with respect to the business of the company, and whether or not in such conversations you gave him directions thereto.

Ans. to 7th cross-int. I was frequently in Chicago while Mr. Warfield was in the employ of the company. I had frequent interviews with him in Chicago during such times and advised with him about the real estate and mortgage loans of the company and gave him directions in regard thereto, but always subject — the directions of the financial committee, already expressed, or to their subsequent approval.

Cross-int. 8th. Please state specifically any and all conversations you may have had with Elizabeth Kirchhoff that you remember, when and where the same occurred, and who were present.

Ans. to cross-int. 8th. I have no recollection of having ever seen the lady.

Cross-int. 9th. Are you familiar with the correspondence between the home office and the Chicago office pertaining to the Kirchhoff business?

172 Ans. to 9th cross-int. I am.

Cross-int. 10th. Please state which of the following answers are made upon your own knowledge and which upon information, and, if a portion is made upon your own knowledge and a portion upon information, please specify which part is made upon your own knowledge and which upon information.

Ans. to 10th cross-int. They have been answered of my own knowledge and belief, except so far as I have referred to the books and correspondence of the company for data.

Cross-int. 11th. Have your answers or any of them to the interrogatories and cross-interrogatories been prepared for or dictated to you or have you been furnished with a copy of such interrogatories or cross-interrogatories or any of them prior to answering same?

Ans. to 11th cross-int. I never saw the interrogatories or cross-

interrogatories or any copy of the same until I commenced to give my deposition. No one has prepared any of my answers or dictated them to me.

JOHN E. DE WITT.

I, Fred. V. Chase, of the county of Cumberland and State of Maine, a notary public in and for said county, duly appointed to take the deposition of the said John E. De Witt, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said John E. De Witt as a witness in the suit — the said Elizabeth Kirchhoff, plaintiff, and the said Union Mutual Life Insurance Company, defendant, he was duly sworn by me, as such notary public, to testify the truth in relation to the matters in controversy between the said Elizabeth Kirchhoff, plaintiff, and the said Union Mutual Life Insurance Company, defendant, so far as he should be interrogated concerning the same; that the said deposition was taken at the office of the Union Mutual Life Insurance Company, in the city of Portland, in the county of Cumberland and State of Maine, commencing on the fourth day of May, A. D. 1885, and adjourning from day to day till the same was completed, to wit, May 6th, A. D. 1885, and that after the said deposition was taken by me as aforesaid the interrogatories and answers thereto, as written down, were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent, John E. De Witt, before me, the oath being administered by me as notary public as aforesaid at the place and on the day and year last aforesaid, and that said deposition was retained by me until sealed up and directed to the clerk of the circuit court of Cook county, Illinois.

Portland, May 6th, 1885.

[NOTARIAL SEAL.]

FRED. V. CHASE,

Notary Public in and for Cumberland County.

Magistrate's fees, \$25.00.

173 STATE OF MAINE, }
Cumberland, } ss :

CLERK'S OFFICE, SUPERIOR COURT,
PORTLAND, May 8th, 1885.

I, A. A. Dennett, clerk of all the judicial courts within and for said county of Cumberland (being courts of record), do hereby certify that Fred. V. Chase is, and at the date of his certificate to the paper hereto annexed was, an acting notary public within and for the county of Cumberland, as appears by the paper hereto annexed; that he is duly commissioned and qualified to administer oaths and take acknowledgments of deeds and other instruments in writing in the county aforesaid, and that the foregoing signature purporting to be his is genuine.

In testimony whereof I have hereunto set my hand and affixed

the seal of the said superior court for said county the day and year first above written.

[SEAL.]

A. A. DENNETT, Clerk.

Also the deposition of Edward R. Seccomb in words and figures following:

Deposition of Edward R. Seccomb.

The deposition of Edward R. Seccomb, of West Newton, in the county of Middlesex and Commonwealth of Massachusetts, a witness of lawful age, produced, sworn, and examined upon his corporeal oath, on the twenty-ninth day of September, in the year of our Lord one thousand eight hundred and eighty-six, in accordance with the stipulation hereunto annexed, at the office of the Union Mutual Life Insurance Company, in the city of Portland, in the county of Cumberland and State of Maine, and at the office of F. V. Chase, in said Portland, county and State last aforesaid, to which place the court of the commissioners was adjourned by consent of J. H. Drummond, Esq., and W. S. Harbert, Esq., counsel of the respective parties, then and there present, by me, Fred. V. Chase, notary public, a commissioner duly appointed by a *dedimus potestatem* or commission issued out of the clerk's office of the circuit court of Cook county, in the State of Illinois, bearing teste in the name of Henry Best, Esq., clerk of the said circuit court, with the seal of said court affixed thereto and to me directed as such commissioner, for the examination of Charles L. Drummond, a witness in a certain suit and matter in controversy and now pending and undetermined in the said circuit court, wherein Elizabeth Kirchhoff is plaintiff and The Union Mutual Life Insurance Company is defendant, on behalf of the said defendant on all interrogatories to be propounded to him orally, both on the part of the said plaintiff and of the said defendant, and none other, it being agreed by the stipulation above referred to and hereunto attached that the deposition of the said E. R. Seccomb should be taken at the same time and before the same officer who shall take the deposition of C. L. Drummond.

174 The said EDWARD R. SECCOMB, a witness in behalf of the said defendant in the above-named suit, being first duly sworn by me as a witness in the said cause previous to the commencement of his examination to testify the truth, as well on the part of the plaintiff as the defendant, in relation to the matters in controversy between the said plaintiff and defendant so far as he should be interrogated, testified and deposed as follows:

Interrogatories Propounded by J. H. Drummond, Counsel for Defendant.

(Complainant's counsel objects to the taking of any testimony at this time for the reason, amongst others, that the defendant has caused this case to be placed upon the trial calender and the same

is liable to be reached for trial before the complainant shall have had an opportunity for meeting this testimony.)

Int. 1. What is your name, residence, age, and occupation?

Ans. Edward R. Seccomb; West Newton, Massachusetts; seventy; not in active business.

Int. 2. Were you connected with The Union Mutual Life Insurance Company, the defendant in this case, from A. D. 1876 to about April, A. D. 1881? If yea, in what capacity?

Ans. I was, as superintendent of loans.

Int. 3. Whether or not, while acting as such, you were in the habit of being at Chicago? If yea, about how often?

Ans. I was. I was there about every two or three months. Would stay longer or shorter; sometimes two or three weeks or more at a time.

Int. 4. Did you know Edwin A. Warfield, then in the employ of the company at Chicago?

Ans. I did.

Int. 5. Did you know Elizabeth Kirchhoff, then of Chicago?

Ans. I did not.

Int. 6. Did you have knowledge of a loan by the Union Mutual Life Insurance Company to Elizabeth Kerchhoff?

Ans. I heard something about it at the time, but I have forgotten the particulars.

Int. 7. What instructions, if any, did you give said Warfield in relation to said loan or to any proceedings in relation thereto?

Ans. I do not recollect that I ever gave him any.

(Question and answer objected to.)

Int. 8. What duty, if any, did you have in relation to the foreclosures of mortgages in any method provided by law?

(The counsel hereby stipulate that objections to testimony on account of immateriality or irrelevancy are to be considered as made without being further stated.—F. V. C., magistrate.)

Ans. to 8. I have nothing special to do with the mortgages. The important matters were submitted to the home office by an attorney in the office at Chicago.

Int. 9. What authority, if any, did you have to direct
175 Warfield to make arrangements with parties against whom foreclosure proceedings had been commenced for a compromise or a waiver of foreclosure proceedings or of their legal affect?

(Objected to as not the best evidence.)

Ans. I had no authority except that which I received in such cases from the home office.

Int. 10. State whether you received any such authority from the home office in relation to the Kirchhoff loan.

Ans. I have no recollection that I did.

Int. 11. State whether you ever gave said Warfield any such authority?

Ans. I have no recollection that I ever did.

Int. 12. What authority, if any, did you give said Warfield to contract with Kirchhoff that if Kirchhoff would execute a quitclaim deed of the mortgaged premises, the defendant would allow him to purchase his homestead and the Tanner lot or either of them at an appraisal to be made by James H. Rees?

Ans. I have no recollection of having any conversation with him on the subject.

Int. 13. Can you state whether you ever undertook to give said Warfield such authority in relation to the company's business?

Ans. I say I never did unless I had authority from the home office.

Int. 14. Were you acquainted with Daniel Thorp, of Boston?

Ans. I was.

Int. 15. What position did he hold in the company?

Ans. He was vice-president of the company.

Int. 16. Is he living; if not, when did he die?

Ans. He is not living; I think that he died two years ago.

Int. 17. You speak of receiving instructions from the home office. How did you receive such instructions—from whom?

Ans. From the president.

Int. 18. Did you generally receive such instructions from him orally before going to Chicago or other places where you went on the company's business?

Ans. No, sir; generally by correspondence.

Int. 19. You received instructions frequently before going West, did you not, with reference to what you should do with respect to matters of business pending at the time?

Ans. Very seldom.

Int. 20. Before going to Chicago did you not usually consult with Mr. De Witt, the president of the company, in regard to the business to be attended to there?

Ans. I did.

Int. 21. And in case you received instructions during such consultations from Mr. De Witt with respect to business at Chicago you endeavored to attend to it according to such instructions, did you not?

Ans. Yes.

176 Int. 22. Please state whether, in pursuance of such consultations and instructions, you from time to time, while at Chicago, had interviews with Mr. Warfield, the financial agent at Chicago, and with Mr. Kendall, the attorney at Chicago, and gave them directions as to business.

Ans. I only told them what to do by the advice of the president.

Int. 23. Did you ever receive any instructions with regard to the Chicago business from the financial committee?

Ans. I don't remember that I ever did.

Int. 24. How long have you been connected with the company, Mr. Seccomb, and in what capacities have you been connected with it?

Ans. I have been a director for twenty-five years or more. I

attended to their real-estate business and loans in the West for three or four years.

Int. 25. Did you give much attention to the details in settlements which were made by the company or was yours a sort of general supervision of matter?

Ans. It was a sort of general supervision of matters.

Int. 26. Who was the company's financial agent at Chicago during the period that you were acting as superintendent?

A. I think that Dr. Boone was a part of the time.

Int. 27. Who succeeded Dr. Boone?

(Objected to as assuming what is not true.)

Ans. I don't remember.

Int. 28. When did Dr. Boone cease to have charge, more or less, of the company's business at Chicago?

Ans. I don't remember the date.

Int. 29. Did he resign or was he removed?

Ans. I don't remember.

Int. —. Don't you remember to whom he transferred the business in his hands belonging to the company?

Ans. No; I don't recollect.

Int. 31. Is it not true that after Dr. Boone ceased to be the company's financial agent at Chicago that Mr. Warfield was appointed such, and that circulars addressed to persons holding loans of the company were printed and mailed announcing his appointment as financial agent of the company at Chicago?

Ans. I think I remember that; think he was appointed agent; don't know whether financial agent or not; don't remember about the circulars.

Int. 32. How extensive was Dr. Boone's authority?

Ans. His authority came from the president of the company before I was appointed; don't know to what extent. I think it was very general.

Int. 33. Do you not remember that Mr. Warfield was advertised as the financial agent of the company at Chicago and as the successor of Dr. Boone?

Ans. That is my impression, but I do not remember the details.

Int. 34. Do you remember what relation Mrs. Diversey had to the Kirchhoff loan?

177 Ans. I do not.

Int. 35. Do you know how Mrs. Diversey was settled with?

Ans. I do not.

Int. 36. Do you know whether the company ever released to her any property; and, if so, for what consideration?

Ans. I do not.

Int. 37. Do you know the amount of the Kirchhoff loan?

Ans. I don't remember.

Int. 38. Do you remember ever to have heard of any mistake in the description of any property securing the Kirchhoff-Diversey loan?

Ans. I do not.

Int. 39. Do you remember to have seen any correspondence from the company's attorney at Chicago, Mr. Kendall, advising the company of the possible invalidity of Mrs. Kirchhoff's paper?

Ans. I don't remember of seeing any of the letters.

Int. 40. Do you remember of ever hearing of Mr. Kirchhoff's bankruptcy?

Ans. I don't remember that I did.

Int. 41. Did you ever know of propositions and counter-propositions between the company and the Kirchhoffs and the Diverseys with relation to the funding of the Kirchhoff loan?

Ans. No; I don't know anything about it.

Int. 42. At the time you were at Chicago is it not true that Mr. Warfield and Mr. Kendall consulted with you in regard to pending matters and advised you of their then situation?

Ans. I believe they did.

Int. 43. Is it not true that this whole matter has largely gone out of your mind?

Ans. Yes, sir.

Int. 44. Then are you able to say that you may not have been fully advised of very many matters pertaining to the loan in question and given many directions in regard thereto which have now wholly passed from your mind?

Ans. Many of the facts have passed from my mind, but any directions that I gave in the case were received from the home office.

(Adjourned to meet at this place Thursday, September 30th, 1886, at nine o'clock a. m.

F. V. C., *Magistrate.*)

Met, according to adjournment, Sept. 30th.

Adjourned to Oct. 1st, 1886, at nine a. m.

F. V. C., *Magistrate.*

Oct. 1st.—Met according to adjournment.

F. V. C.

Int. 45. What did you do while at Chicago in connection with the company's business?

Ans. Looking at the property and getting valuations of our property.

178 Int. 46. What else?

Ans. That was the principal thing I went out for, to see what property we had and what it was worth.

Int. 47. Did you examine into the value of the Kirchhoff property?

Ans. The company employed two appraisers for that especial business and we took their report. I made no personal appraisal.

Int. 48. When did you have the first appraisal made?

Ans. I don't remember the date; could find it out, probably, by looking at my books.

Int. 49. How many appraisals did you make or have made of the company's property?

Ans. I had but one. Possibly the company had others afterwards.

Int. 50. Were there or were there not, while you were there, various foreclosures and sales and settlements, in which the company was interested and about which you were consulted by Mr. Warfield and Mr. Kendall?

Ans. I think so.

Int. 51. Can you name some of the more important matters which were pending at that time?

Ans. Can't bring my mind to recall them; my memory isn't so good as it used to be.

Int. 52. Then you are unable to remember, as I understand you, in what matters at Chicago you took an active part, giving Mr. Warfield and Mr. Kendall counsel and direction?

Ans. Well, my memory don't serve me in those matters. I know that they had directions from the home office. I know that the rule was that they should look to the home office for their directions.

Int. 53. Did you meet Mr. De Witt out there frequently?

Ans. Occasionally.

Int. 54. When you were both there, state whether or not consultations were held by all four of you—Mr. Warfield, Mr. Kendall, Mr. De Witt, and yourself—and methods of procedure determined.

Ans. Yes; I have no doubt we talked matters over together. I don't know as we met all four together.

Int. 55. Do you remember now what particular matters were talked over and determined at those interviews?

Ans. There was several, but I can't particularize them now.

Int. 56. Can you remember whether the Kirchhoff and Diversey matter were among them?

Ans. I think they were, but I had no counsel with them — those matters that I remember.

Int. 57. Are you willing to state that you did not have counsel with them in these matters?

A. No, sir.

Int. 58. Did you also meet Mr. Sharpe in Chicago occasionally?

Ans. Occasionally; not often.

Int. 59. State whether or not Mr. Sharpe took a more active part in the management of the company's affairs than yourself.

179 Ans. He gave his attention to the Nebraska loans and matters — his locality while I was in Chicago and other places. He occasionally came to Chicago.

Int. 60. Is it not true that Mr. Sharpe, as vice-president of the company, took a more active part than you, as a director, with regard to Chicago matters generally?

Ans. I don't know as he took a more active part. He had more authority than I had.

Int. 61. State whether or not Mr. De Witt, coming to Chicago while you were there and leaving you there, gave you directions as to what should be done by you and Mr. Warfield and Mr. Kendall concerning the company's business?

Ans. I don't remember of his giving me any special directions as to what to do. I advised with him what I was doing.

Int. 62. Was that true as to what you intended to do as well as with regard to what you had done?

Ans. It was with regard principally to my going to other places to take valuations while he was at Chicago attending to the Chicago business.

Int. 63. Then I understand that Mr. De Witt sometimes relieved you?

Ans. He frequently went out to Chicago with regard to business there.

Int. 64. And when he came, did personally direct all of you?

Ans. Well, he gave his attention to the business and advised with Warfield and the others there, with Mr. Kendall.

Int. 65. Was that control and direction by Mr. De Witt coextensive with the business of the company?

Ans. Well, I don't know to what extent he was with them. I was there only a small part of the time, but the directions that he gave them were supposed to be attended to. He was with them a part of the time. My duties called me elsewhere.

Int. 66. Did he not frequently have Mr. Sharpe in charge of the business there in connection with Mr. Kendall and Mr. Warfield?

Ans. I should say not frequently.

Int. 67. You know of Mr. Sharpe's having been there?

Ans. Yes.

Int. 68. And that when he was there he gave Mr. Warfield and Mr. Kendall directions with regard to the company's business?

Ans. I don't know that he did.

Int. 69. You have said that they consulted together. Do you not know that their actions with regard to the company's business was often the result of such consultation together?

Ans. I don't know the nature of their conversation.

Int. 70. Do you remember on what terms the company offered to fund its loans at Chicago?

Ans. I have no recollection.

Int. 71. Was it not true that the company was anxious to get all the old loans which Dr. Boone had placed out of his hands and adopted a rule whereby the old loans would be funded, the
180 interest reduced, and payments of one-tenth annually of the principal and interest accepted in place of the old loan upon making new papers?

Ans. In many cases they made changes to strengthen the loan and secure prompt payment of interest.

Int. 72. Was not the plan adopted substantially as I have stated?

Ans. I don't know to what extent.

Int. 73. Do you remember the basis of sales to mortgagors on partial payments adopted by the company?

Ans. I do not.

Int. 74. Do you know whether or not the company adopted the policy in about 1878 of selling or releasing to its mortgagors property included in the mortgages or trust deeds upon ten-year pay-

ments at Rees' and Morey's valuation, one-tenth and interest payable each year?

Ans. My memory don't serve me in any such cases.

Int. 75. That is, you don't remember whether such a policy was adopted or not?

Ans. I don't remember. There may have been.

Int. 76. Do you remember what particular instruction, if any, you had in regard to the Kirchhoff business?

Ans. I do not remember.

Int. 77. Do you remember what particular instruction, if any, you gave Mr. Warfield or Mr. Kendall or both in regard to the Kirchhoff matter?

Ans. I don't remember of giving them any on that subject.

Int. 78. Are you able to say that you did not?

Ans. I could not swear that I did not, but I have no recollection of doing so.

Int. 79. You are acquainted with the present controversy between the company and Mr. and Mrs. Kirchhoff, are you not?

Ans. I know that there is one, but I don't know what the nature of it is.

Int. 80. Do you remember to have seen the property in controversy—that is, the property known as the Kirchhoff homestead, consisting of two lots near the water works in Chicago?

Ans. I may have seen it years ago, but I have forgotten the circumstances.

Int. 81. Would a sale of the company's property at its appraisal value have been considered any concession by the company, provided such sale had been made on the ten-years plan above referred to and the deferred payments had borne interest?

Ans. I am not able to answer that question.

Int. 82. Why not?

Ans. Because I am not sufficiently posted in the matter.

Int. 83. Was it not and has it not always been the policy of the company to realize on its real estate so as to get the same into interest-bearing securities?

Ans. I think it has been so the last few years.

181 Int. 84. Was it ever the policy of the company, so far as you know, to speculate in real estate?

Ans. I never knew that it was.

Int. 85. Are you not, then, able to say whether or not a sale of a parcel of real estate at its full appraised value on partial payments, the deferred payments drawing interest, would be in accordance with or contrary to the usual policy of the company?

Ans. If we could get more than the appraised value we should not sell it at the appraised value. We had to sell some for less.

Int. 86. Would you consider such a sale at its full appraised value a concession?

Ans. I should think it would depend a good deal on the circumstances.

Int. 87. What circumstances?

Ans. It might be worth more money than the appraisal.

Int. 88. However, supposing such sale were at its full value, then would it be any concession?

Ans. I should want to know the fact before I could decide upon that question.

Int. 89. What additional facts should you want to know before answering the question?

Ans. I should want the case explained before I could decide.

Int. 90. When you first went to Chicago who had charge of the company's business there?

Ans. Dr. Boone.

Int. 91. Who accompanied you then?

— I think it was Mr. Kendall. No; I'll alter that. I think he joined me afterwards.

Int. 92. Can you state about when you first went out there?

Ans. I think it— about 1874 or 1875; am not sure which.

Int. 93. How long did Dr. Boone continue in office as financial agent after you arrived there?

Ans. As near as I can remember, I think that he remained there some months.

Int. 94. Did you continue in Chicago from the time you arrived there first until Mr. Warfield took charge?

Ans. No, sir; I returned to Boston before Mr. Warfield took charge.

Int. 95. Were you there when Mr. Warfield took charge?

Ans. I think that I was there when he was appointed, but this was not at my first visit.

Int. 96. How was the transfer made?

That is to say, did Mr. Warfield take possession of the old office which Dr. Boone had occupied or were the books and papers transferred to some other office which Mr. Warfield occupied?

Ans. I think that Warfield went into the old office and subsequently moved into another.

Int. 97. Did Mr. Warfield have charge of policies, as well as of loans and real estate, or only of loans and real estate?

Ans. Only of loans and real estate, as I understand it.

182 Int. 98. Do you know what, if any, advertisement or announcement was made of the change from Dr. Boone to Mr. Warfield?

Ans. I do not know.

Int. 99. Do you know how many loans or about how many the company had at Chicago at this time?

Ans. I don't know; could tell if I had my book with me.

Int. 100. Can you approximate it?

Ans. Should think they had as many as fifteen or eighteen hundred.

Int. 101. Please approximate the gross amount of the company's loans at Chicago at that time.

Ans. I couldn't do it with any accuracy whatever. I know that our loans at that time in the West were at least four millions of dollars. It is my impression that more than half of it was in.

Int. 102. Was it not true, therefore, that much of the matter of

details relating to the management of such loans was necessarily left with the local financial agent?

Ans. A large portion of it.

Int. 103. Do you remember whether or not you were at the time advised of settlements which were made while you were at Chicago?

Ans. I do not.

EDWARD R. SECCOMB.

And the defendant produced W. B. WIRT as a witness, who, having been first duly sworn, testified as follows:

Direct examination.

By Mr. GROSSCUP:

Q. What is your name?

A. W. B. Wirt.

Counsel for complainant objected to the testimony of this witness. Objection overruled, and exception on behalf of the complainant.

Q. What is your business?

A. Assistant clerk of the United States court.

Q. Look at the paper I now show you and state whether it is part of the files.

A. Yes, sir; files of the Mutual Life Insurance Company *vs.* Julius Kirchoff *et al.*, in chancery.

Q. What is it?

A. A bill.

Q. The original bill?

A. Yes, sir.

Q. File-mark of what date?

A. July 11, 1878.

Q. Look at that paper and state what it is.

A. That is the answer of Angela Diversy, one of the defendants in the bill; the same case filed November 20, 1878.

Q. Look at these two papers and see what they are.

A. This is an alias subpoena issued the 9th of August, 1878.

183 The COURT: Against whom?

A. Against Julius Kirchoff and Elizabeth Kirchoff, Angela Diversy, and Andrew P. Johnson. This is an original draft of the order of default, dated November 11, 1878.

Mr. GROSSCUP: Default against the Kirchoff- and Mrs. Diversy?

A. Yes, sir.

Q. Look at that paper and state what it is.

A. This is an order of November 16, 1878, for the appointment of a receiver, A. Warfield.

Q. What is that?

A. Petition of James R. Page.

Q. What is the substance of it?

A. A petition to attorn to the receiver.

Q. Petition to have whom attorn?

A. The tenants and all persons in possession of said property, filed Oct. 28, 1881.

Q. What is that paper?

A. That is an order entered October 8, 1881.

Q. What is the substance of it?

A. That Julius Kirchoff shall show cause in five days after notice is served upon him directed to the marshall.

Q. What is the paper I now hand you?

A. Answer to rule as to writ of assistance filed in 1881.

Q. Whose answer?

A. Answer of Julius Kirchoff.

Q. What is the paper I now hand you?

A. Writ of assistance.

Q. Writ of assistance for what?

A. Against Julius Kerchoff and other defendants to foreclose a mortgage on the following-described property. (Description of property.)

Q. To assist in doing what; getting possession of what?

A. Getting possession of lots 1, 2, and 3, 10, 11, and 12, in block four.

Mr. GROSSCUP: Does that writ of assistance cover this property?

Mr. HARBERT: Yes, sir.

The COURT: What is the date?

A. It was issued the 16th of November, 1881.

Q. What is the paper which I now hand you?

A. A report of the receiver, E. A. Wartfield, first account filed September 6, 1880.

Mr. GROSSCUP: It will not be denied that this case was referred to a master to take testimony?

Mr. HARBERT: No.

Mr. GROSSCUP: State what that is.

A. A report of Henry W. Bishop, one of the masters in chancery.

Q. Of what?

A. United States circuit court, a report of the testimony filed July 2nd, 1880.

Q. What is that paper?

184 A. This is the original draft of an order of default and reference to a master entered the 15th of March, 1880.

Q. What is the paper which I now hand you?

A. Draft and decree and sale.

Q. Decree and sale of what property?

A. The property described.

Q. I want to know whether it covers this property or not.

Counsel for complainant admits it covers the property.

Mr. GROSSCUP:

Q. What is the paper which I now hand you?

A. This is the master's report of the decree and sale.

Q. Under that decree?

A. Yes, sir.

Q. Sold to whom?

A. Sold to the Union Mutual Life Insurance Company.

Q. Can you state the aggregate amount of the sale?

A. \$92,000 was all of the sale.

The COURT: What is the date of it?

A. Filed the 29th of October, 1880.

Mr. GROSSCUP: I wish you would turn to lots 2 and 4, in the Canal Trustees' subdivision, and state what they were sold at.

A. Well, I think they were all sold—

Mr. HARBERT: It is admitted one was sold for \$8,000 and the other for \$9,000.

Mr. GROSSCUP:

Q. What is that paper?

A. Draft of an order confirming sale on the 24th of December, 1880.

Q. Confirming sale of all the premises mentioned in the bill and in the decree itself?

A. Confirming sale that was reported in the master's report.

Q. What is that paper?

A. This is an order confirming master's deeds January 21, 1882.

Mr. GROSSCUP: Now, for the purpose of shortening the record it is admitted here that we have produced papers showing the foreclosure of all the property mentioned in the bill, and the master deeds were issued and duly recorded *except* as to the forty acres released to Mrs. Diversy. We offer these papers we have identified without any order of reference to them.

Said papers were then offered in evidence and objected to by complainant as irrelevant, immaterial, and incompetent; which objection the court then and there overruled; to which ruling the complainant then and there excepted, and the said papers were then received in evidence and are in words and figures as follows:

It is hereby stipulated that, for the purpose of rendering the record less voluminous, said papers may be omitted by the clerk in making up the record, and that the following stipulated statement of facts may be inserted in said record in lieu of said files, namely:

185 First. That the defendant company filed a bill in the United States circuit court for the northern district of Illinois upon the 11th day of July, 1878, for the purpose of foreclosing the deed of trust from Julius Kirchoff, Elizabeth Kirchoff, and Angela Diversy to Levi D. Boone, dated May 8, 1871, which said deed of trust was given to secure the joint judgment note of said three last-named grantors.

Said bill sought to foreclose said trust deed as to *of* all the property therein mentioned (except that which had been previously released), including the property involved in this suit, namely, lots two (2) and four (4), in block twenty-one (21), in the Canal Trustees' subdivision of the south fractional quarter of section three (3), township thirty-nine (39) north, range fourteen (14) east, of the third principal —; that the bill also sought to correct an error in the description of the property in the trust deed belonging to Mrs. Diversy.

Second. August 9th, 1878, an alias chancery subpœna, returnable the first Monday in September, 1878, was issued to all the defendants and service had upon the 10th day of August, as appears by the return of the marshal. It appears by said return that Elizabeth Kirchoff was served by leaving a copy of the subpœna with her husband.

Third. That on the 20th day of November, 1878, Angela Diversy, one of the defendants in said last-named suit, filed her answer in said cause, in which she averred that the loan secured by said trust deed was not made to her, but that she became a party to the notes and trust deed solely as a surety for Julius Kirchoff, and she denied that there was any mistake in the description of the premises in the trust deed. She further averred that she was induced to execute said trust deed through the false representation of Julius Kirchoff that it was to secure \$5,000 only, and that the company was aware of the said misrepresentation and of the fact that she was thereby led to execute the trust deed, and denies that the defendant company have a right to recover from her any greater sum.

Fourth. That on the eleventh day of November, 1878, there was entered an order in said cause reciting that, said Julius Kirchoff, Elizabeth Kirchoff, and other defendants being severally called to appear and make answer to the bill and that none of them appearing, default was taken against them and the bill taken as confessed.

Fifth. That on the 16th day of November, 1878, there was entered in said case an order appointing Edwin A. Warfield receiver of certain of the property described in the trust deed, including the premises in question.

Sixth. That on or about the 6th day of September, 1880, the said Edwin A. Warfield, receiver, filed a written report in said cause, by which it appears that the said Julius Kirchoff paid him rent for the use and occupation of said premises.

It is further stipulated that thereafter the said Edwin A. Warfield, receiver, resigned, and that James R. Page was appointed receiver in said cause.

186 Seventh. That on the 28th day of October, 1881, the said James R. Page, receiver, filed a petition representing that he had been appointed receiver in said cause; that Julius Kirchoff was in possession of said lots two (2) and four (4) of block twenty-one (21) aforesaid, and that he refused to surrender possession of the same to said receiver or to pay rent therefor. Said receiver prayed for a writ of assistance to eject said Julius Kirchoff from said premises.

Eight. That on the 28th day of October, 1881, the court entered an order upon said Julius Kirchoff to show cause within five days why he should not surrender possession of said premises to said receiver.

Ninth. That on the 16th day of November, 1881, said Julius Kirchoff filed an answer to said rule; which answer is set out in the record immediately following the testimony of E. A. Warfield.

Tenth. That on the 16th day of November, 1881, the said court

issued a writ of assistance directing the marshal to put said James R. Page, receiver, into possession of said premises.

Eleventh. That on the 17th day of January, 1880, the bill in said cause was amended, making Eben F. Runyan, of the State of Nebraska; Robert E. Jenkins, assignee in bankruptcy of said Runyan, and George W. Stanford parties defendant, and that on the 15th day of March, 1880, an order of default was taken against said last-named defendant and the case referred to Henry W. Bishop, master in chancery, to take proof.

Twelfth. That said master in chancery took testimony in said cause, and that on the second day of July, 1880, he filed his report, in which he found that the allegations of the bill were true and recommended a foreclosure of said deed of trust.

Thirteenth. That on the 30th day of August, 1880, there was entered in said cause a decree confirming said master's report and ordering said master to make a sale of the entire premises covered by said deed of trust, except such parcels as had been theretofore released to Mrs. Diversy and others.

Fourteenth. That on the 29th day of October, 1880, the said master filed in said cause his report that in pursuance of said decree he did on the 20th day of October, 1880, make a sale of said premises as described in said decree; that the highest bid at said sale was by the complainant for the sum of \$92,000, and that there remained unsatisfied under said decree the sum of \$1,027.24; that said property was offered and struck off in separate parcels, the whole aggregating \$92,000, and that said lot two (2) above described was bid in for \$9,000, and said lot four (4) for the sum of \$8,000.

Fifteenth. That on the 24th day of February, 1881, there was entered in said cause an order confirming said master's sale.

Sixteenth. That on the twenty-first day of January, 1882, the time for redemption having expired, the said master made deeds to said complainant of the various tracts of land embraced in said deed of trust, including the premises in question.

Seventeenth. That on the 21st day of January, 1882, there was entered in said cause an order approving said master's deeds.

187 And the defendant thereupon produced EDWIN A. WARFIELD as a witness, who, having been duly sworn, testified as follows:

Direct examination.

By MR. GROSSCUP:

Q. You were formerly receiver in the foreclosure suit of the Union Mutual Life Insurance Company against Julius Kirchoff and others?

A. I was receiver for a certain period.

Q. I hand you what Mr. Wirt says is your original report as such receiver. Do you recognize it?

A. I do.

It is admitted that an amendment was filed in the Federal court in the foreclosure suit January 17, 1880.

And the defendant thereupon read in evidence the deposition of one Charles L. Drummond, which is in words and figures as follows:

Deposition of Charles L. Drummond.

The deposition of Charles L. Drummond, of Portland, of the county of Cumberland and State of Maine, a witness of lawful age, produced, sworn, and examined, upon his corporal oath, on the twenty-ninth day of September, in the year of our Lord one thousand eight hundred and eighty-six, in accordance with the stipulation hereunto annexed, at the office of the Union Mutual Life Insurance Company, in the city of Portland, in the county of Cumberland and State of Maine, and at the office of F. V. Chase, in the city of Portland, county of Cumberland and State of Maine, to which place the court of the commissioner was *adjoined* by consent of Hon. Josiah H. Drummond and W. S. Harbert, Esq., counsel of the respective parties, then and there present, by me, Fred. V. Chase, a notary public, a commissioner duly appointed by a *dedimus potestatem* or commission, issued out of the clerk's office of the circuit court of Cook county, in the State of Illinois, bearing teste in the name of Henry Best, Esq., clerk of the said circuit court, with the seal of said court affixed thereto, and to me directed as such commissioner, for the examination of the said Charles L. Drummond, a witness in a certain suit and matter now in controversy, now pending and undetermined in the said circuit court, wherein Elizabeth Kirchoff is plaintiff and The Union Mutual Insurance Company is defendant, in behalf of the said defendant, as well upon the cross-interrogatories of the plaintiff as on the interrogatories of the defendant propounded to him orally and upon none others.

The said CHARLES L. DRUMMOND, being first duly sworn by me as a witness in the said cause, previous to the commencement of his examination, to testify the truth as well on the part of the
 188 plaintiff as the defendant in relation to the matters in controversy between the said plaintiff and defendant so far as he should be interrogated, testified and deposed as follows:

Interrogatories Propounded by Hon. Josiah H. Drummond, Counsel for Defendant.

(Complainant's counsel objects to the taking of any testimony at this time for the reason, amongst others, that *that* the defendant has caused this case to be placed upon the trial calendar, and the same is liable to be reached for trial before the complainant shall have had an opportunity for meeting the testimony; and also, in so far as this deposition seeks to introduce in evidence letters and other instruments in writing, it is objected to because the copies of such instruments in writing are not the best evidence, and because there is no sufficient evidence to charge the complainant with knowledge of their contents nor evidence showing that such instruments, so far as they are letters, were written by or on behalf of the party pur-

porting to subscribe to them, nor that they were sent to or received by the party or parties to whom they purport to be addressed, and are otherwise immaterial, irrelevant, incompetent, and secondary.) (Counsel for the respective parties stipulate that the last above objection may apply to all questions and answers in this deposition.)

F. V. C.

Interrogatories Propounded by Hon. Josiah H. Drummond, Counsel for Defendant.

Int. 1. What is your name, residence, age, and occupation?

Ans. Charles L. Drummond; Portland; forty-two; clerk of the Union Mutual Life Insurance Company.

Int. 2. In what department?

Ans. I have charge of the real-estate and mortgage department.

Int. 3. Who has the custody of the correspondence, papers, and documents relating to that department?

Ans. I do.

Int. 4. Have you examined the files, letter books, papers, and documents for all correspondence, reports, papers, and documents relating to the Kirchhoff loan? If yea, can you produce them?

Ans. I have and I can.

Int. 5. Please examine the paper herewith handed you and state what it is.

Ans. This is an agreement between Edwin A. Warfield and the Union Mutual Life Insurance Company.

Int. 6. Please read it.

(It is hereby stipulated by the counsel of the respective parties that instead of reading said agreement and having same copied at length by the magistrate in answer to the last above interrogatory that a copy thereof may be annexed to this deposition as an exhibit marked "Exhibit 1, F. V. C.," such exhibit, however, to have no further force as evidence than and to be subject to the same objections as the answer called for would be subject to if this stipulation had not been made. This stipulation is intended to relate to all questions and answers in this deposition calling for or purporting to give the contents of written instruments.

F. V. CHASE, *Magistrate.*)

Ans. I now here present a copy of said agreement, to be annexed to this deposition as an exhibit, marked "Exhibit 1, F. V. C."

Int. 7. Please examine the paper I now hand you, state what it is, and present a copy thereof to be attached to this deposition as an exhibit.

Ans. It is an agreement between Robert B. Kendall and the Union Mutual Life Insurance Company. I now here present a copy of said agreement, to be annexed to this deposition as an exhibit, marked "Exhibit 2, F. V. C."

Int. 8. Please examine the paper I now show you, state what it is, and present a copy thereof to be attached to this deposition as an exhibit.

Ans. It is a power of attorney from the Union Mutual Life Insurance Company to Robert B. Kendall. I now here present a copy of said power of attorney, to be annexed to this deposition as an exhibit, marked "Exhibit 3, F. V. C."

Int. 9. Do you find any other agreement or copy of an agreement between the company and Mr. Warfield?

Ans. I find no original. I find this paper, which I hereunto annex, marked "Exhibit 4, F. V. C." I have not compared it with any original and personally know nothing further about it.

(The introduction of this paper is further objected to because it does not purport to be even a copy of any original.)

Int. 10. Is there any document purporting to be an agreement either with said Warfield or said Kendall other than the one here produced on the company's files or anywhere else to your knowledge?

Ans. No, sir; not to my knowledge. I have spent nearly two weeks in search for papers connected with the Kirchoff loan. I have made strict search everywhere they should be or would be likely to be, and have exhausted the search.

Int. 11. Who, if you know, was J. H. Gallery, and what was he doing?

Ans. To the best of my knowledge he was a clerk for Robert B. Kendall and Edwin A. Warfield.

Int. 12. Have you examined in like manner the files and archives of the company for the correspondence and letters to the company from all persons acting for the company which relate to the Kirchoff loan? If yes, will you produce them?

Ans. I have, and herewith produce them and annex hereto copies in accordance with the above stipulation. In some cases
190 portions of letters, &c., not relating to the Kirchoff loan are omitted, and the omission is indicated by stars.

These exhibits are marked "Exhibit 5" to "Exhibit 109," inclusive, "F. V. C."

Int. 13. Have you in like manner examined the files and archives of the company for all documents and papers of every kind and the letter books giving letter-press copies of all letters going from the company from its home office to persons in Chicago and relating to the Kirchoff loan? If yes, will you produce them?

Ans. I have, and I herewith produce them and annex copies of the same to this deposition as exhibits, marked "Exhibit 110 to Exhibit 167," inclusive, "F. V. C."

Cross-interrogatories and Answers Thereto by the Witness on the Part of the Plaintiff.

Interrogatories propounded by W. S. HARBERT, Esq., counsel for plaintiff:

Int. 14. Please state the names of the several officers under which the defendants transacts its business.

Ans. President, secretary, assistant secretary, cashier, and board of directors. The cashier may not be an officer.

Int. 15. What department are you connected with?

Ans. The real-estate and mortgage department.

Int. 16. How long have you been connected with that department?

Ans. Most of the time since August, 1882.

Int. 17. Of what do your duties mainly consist?

Ans. I have charge of the books relating to the real estate and mortgages and of the correspondence connected with the same and the custody of all the deeds and mortgages and of all the papers relating to this department.

Int. 18. Who was your predecessor?

Ans. John Wain.

Int. 19. Have you, as being in charge of the real-estate and mortgage department, any discretionary power with respect to removing paper?

Ans. No, sir.

Int. 20. Has the company now or has it ever had, to your knowledge, any superintendent of loans?

Ans. It has none now and has never had, to my own knowledge.

Int. 21. Has the company now or has it ever had a superintendent of real estate?

Ans. It has none now and has never had one, to my own knowledge.

Int. 22. What body under the charter and by-laws of the company is vested with the management of its affairs?

Ans. I don't know, sir.

Int. 23. From whence do most of the orders respecting its management emanate?

191 Ans. I can tell you only as to the real-estate and mortgage department.

Int. 24. Do you not know whether, as a matter of fact, orders generally emanate from the board of directors, from the finance committee, or from the president concerning the general management of the affairs of the company? If so, state which.

Ans. Generally from the president, as far as I know.

Int. 25. Did you personally have anything to do with the Kirchhoff loan?

Ans. No.

Int. 26. Do you personally know anything about it?

Ans. No.

Int. 27. Do you know, except as you have learned from others, who had to do with said loan?

Ans. I know only as I have learned from others and from the books and correspondence in the office.

Int. 28. Were there not, in addition to the letters which you have produced, other papers termed reports which related to the Kirchhoff loan and which are on file in the company's office or entered of record in the books of the company?

Ans. None except such as I have already presented copies of here.

Int. 29. Can you and will you furnish a statement, to be attached to your deposition as an exhibit, showing any monies received by the company from what is known as the Kirchhoff homestead, either from Kirchhoff or any one else since the company took possession thereof?

Ans. I will endeavor to do so and attach it as an exhibit, marked "Exhibit 168, F. V. C."

Int. 30. In your examination for letters relating to the Kirchhoff loan, have you searched for or attached any letters or copies of any letters purporting to have been written by Elizabeth Kirchhoff, the plaintiff, or Julius Kirchhoff, her husband, or by Mr. Seccomb or by Mr. Sharp to the company?

Ans. My search for letters in this case has been for all letters written to or by the company in regard to this loan, without regard to who they were from or to.

Int. 31. Please state specifically how your correspondence is docketed or indexed, if at all, so that you are enabled to determine subsequently what particular letters relate to any particular subject-matter.

Ans. Letters relating to the real-estate and mortgage department are docketed. Each loan has a number. Every letter received by or written by the company in regard to that loan is docketed under its number, giving the date, from whom, and to whom, and the substance of the letter.

Int. 32. Who had charge of the docketing of the letters and papers pertaining to the Kirchhoff loans?

Ans. The party who had charge of the department for the time being. I do not know who that was.

192 Int. 33. How many clerks have you in your department?

Ans. Since I have been here only one besides the chief. I don't know how many before that time.

Int. 34. Then, I understand you, your examination was confined to a search for such letters and other instruments as were docketed to the Kirchhoff loan, and you do not know who or how many persons made up that docket, nor when it was made up?

Ans. That is true only as to the letters. I do not know who, nor how many persons made up that docket, nor when it was made up.

Int. 35. Under the method which was in vogue at the time the Kirchhoff loan was being foreclosed or settled, would letters written by officers of the company at Chicago to the president here be filed and docketed here, if you know?

Ans. I have no doubt that they would have been.

Int. 36. Please state how E. A. Warfield was described on the letter-heads used at that time by him.

Ans. As I remember, "E. A. Warfield, financial agent."

Int. 37. Will you please attach a letter-head of the sort you referred to to your deposition as an exhibit?

Marked 169, F. V. C.

Ans. I will.

Int. 38. Do you know of a circular issued about the time Mr. Warfield was appointed financial agent, announcing the fact? If so, and you can, will you please attach an issue of such circular to your deposition as an exhibit?

Ans. I do not of my own knowledge. If I can find one I will attach it. I have never seen one.

Int. 39. Please state whether or not Mr. John E. De Witt, president of the company, is now here present in Portland.

Ans. He has been through the day.

Int. 40. Had the company, so far as you know, any other financial agent than E. A. Warfield in Illinois at the time said Warfield was its financial agent at Chicago?

Ans. I have no knowledge about it any way. The books and papers, so far as I know, disclose no other.

Int. 41. What relation are you to the Mr. Drummond who appears as counsel for the defendant company in the taking of this deposition?

Ans. Brother.

Redirect Interrogatories and Answers Thereto by the Witness on the Part of the Defendant.

Interrogatories propounded by Hon. JOSIAH H. DRUMMOND, counsel for the defendant:

Int. 42. From what person or body of persons in the company do the authority and instructions come to your department in relation to making, removing, or extending of loans, the discharge or foreclosure of mortgages, and the renting of real estate?

193 Ans. From the finance committee through the president.

Adjourned to Thursday, Sept. 30th, 1886, at ten o'clock a. m.

F. V. CHASE, *Magistrate.*

SEPT. 30TH, 1886.

Met at ten o'clock a. m. according to adjournment.

Adjourned to Oct. 1st, 1886, at nine o'clock a. m.

F. V. CHASE, *Magistrate.*

OCT. 1ST, 1886.

Met according to adjournment.

Adjourned to Oct. 2d, 1886, at ten a. m.

F. V. C.

OCT. 2D, 1886.

Met according to adjournment.

F. V. C.

Recross-interrogatories and Answers Thereto by the Witness on the Part of the Plaintiff.

Interrogatories propounded by W. S. HARBERT, Esq., counsel for plaintiff:

Int. 43. Please give date and date of record of the master's deed to the company in this case, and give the heading of letters attached as exhibits which show Mr. Warfield as financial agent, and also state on each exhibit whether the same is taken from an original letter or from some copy or record or copy of record.

Ans. The books in the company's office do not give the dates asked for. I have searched the files of the company in the home office and do not find the deed referred to. I will give the copies of letter-heads asked for; also state from what taken.

Adjourned to Oct. 4th, 1886, at ten o'clock a. m.

F. V. C.

Met, according to adjournment, Oct. 4th, 1886.

F. V. C.

Additional Ans. to Int. 43. Would say in addition to my answer to Int. 43 that I have given the copies of letter-heads asked for in all cases where I could find them in the office of the company.

CHARLES L. DRUMMOND.

I, Fred. V. Chase, of Portland, of the county of Cumberland and State of Maine, a commissioner duly appointed to take the depositions of the said Edward R. Seccomb and the said Charles L. Drummond, the witnesses whose names are subscribed to the foregoing depositions, do hereby certify that previous to the commencement of the examination of the said Edward R. Seccomb and
194 the said Charles L. Drummond as witnesses in the suit between the said Elizabeth Kirchoff, plaintiff, and the said Union Mutual Life Insurance Company, defendant, they were duly — by me, as such commissioner, to testify the truth in relation to the matters in controversy between the said Elizabeth Kirchoff, plaintiff, and the said Union Mutual Life Insurance Company, defendant, so far as they should be interrogated concerning the same; that the said depositions were taken at the office of the Union Mutual Life Insurance Company, in the city of Portland, county of Cumberland and State of Maine, at my office, in said Portland, to which place the court of commission was adjourned by consent of the counsel for the respective parties, then and there present, on the twenty-ninth day of September, A. D. 1886, in accordance with the stipulation hereunto annexed, and that after said depositions were taken by me, as aforesaid, the interrogatories and answers thereto,

as written down, were read over to the said witnesses respectively, and that thereupon the same were signed and sworn to by the said deponents, Edward R. Seccomb and Charles L. Drummond, before me, the oath being administered by me, as such commissioner, at my office, to the said Edward R. Seccomb, October 1st, A. D. 1886, and to the said Charles L. Drummond, October 4th, A. D. 1886, and that said depositions were retained by me until sealed up and directed to the clerk of the circuit court of Cook county, in the State of Illinois, at Chicago.

[SEAL.]

FRED. V. CHASE,
Notary Public, Commissioner.

STATE OF MAINE, }
Cumberland, } 88 :

RECORDER'S OFFICE,
MUNICIPAL COURT, CITY OF PORTLAND.

I, Edwin L. Dyer, recorder of the municipal court, city of Portland, within and for the county of Cumberland, in said State (being a court of record), do hereby certify that Fred. V. Chase is a notary public in and for the State of Maine, duly qualified to act as such; that his term of office commenced on the twenty-eight day of February, A. D. 1883, and will expire on the twenty-eight day of February, A. D. 1890, and that the signature purporting to be his is genuine to the best of my knowledge and belief.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of the said municipal court this seventh day of October, A. D. 1886.

EDWARD L. DYER, *Recorder.*

EXHIBIT 1, F. V. C.

Form 164.

Union Mutual Life Insurance Company of Maine.

This agreement made this 21st day of February, A. D. 1878, by and between the Union Mutual Life Insurance Company of
195 Maine, party of the first part, and Edwin A. Warfield, party of the second part: Witnesseth:

That the said party of the first part hereby agrees to employ the said party of the second part at the annual compensation of thirty-five hundred dollars, payable in semi-monthly installments, on the first and fifteenth of each and every month during the continuance of this agreement.

That the said party of the first part further agrees to pay the necessary travelling expenses actually incurred by the said party of the second part, while actually engaged in the prosecution of the business of said party of the first part, away from his place of residence, which for the purposes of this contract is known as Chicago, Cook Co. Illinois.

That the said party of the second part hereby agrees to enter the

service of the said party of the first part, and to devote his whole time and energies in advancing the interest of the said party of the first part in such manner as may be directed by the officers of said company.

It is further understood and agreed, that if the said party of the second part has at any time held any relation to this company, as agent or subagent, or broker, or otherwise, that the acceptance of this appointment will be understood to be and shall be independent thereof, and as an abrogation and annulling of such relation in every respect, and said party of second part shall act as agent solely under this appointment and contract.

Either party hereto may terminate this agreement and the appointment hereunder, unless the same be sooner terminated by death of said party of second part, or by mutual consent, at any time during its continuance, by giving to the other party thirty days' notice in writing, to that effect, and this contract to take effect April 1st, 1878.

In witness whereof the said party of the first part has hereunto in duplicate caused the same to be executed by its president and secretary; and the said party of the second part has hereunto in duplicate, set his hand and seal this twelfth day of March, 1878.

(Signed)

JOHN E. DE WITT, *President*.

E. A. WARFIELD. [SEAL.]

J. P. CARPENTER, *Secretary*.

Sealed and delivered in the presence of—
ALBERT G. MITTON.

EXHIBIT 2, F. V. C.

Form 164.

Union Mutual Life Insurance Company of Maine.

This agreement, made this first day of April, A. D. 1878, by and between the Union Mutual Life Insurance Company of
196 Maine, party of the first part, and Robert B. Kendall party of the second part, witnesseth:

That the said party of the first part hereby agrees to employ the said party of the second — at the annual compensation of twenty-five hundred dollars, payable in semi-monthly installments, on the first and fifteenth of each and every month during the continuance of this agreement.

That the said party of the first part further agrees to pay the necessary travelling expenses actually incurred by the said party of the second part, while actually engaged in the prosecution of the business of said party of the first part, away from his place of residence, which for the purposes of this contract is known as Chicago, Illinois.

That the said party of the second part hereby agrees to enter the service of the said party of the first part and to devote his whole

time and energies in advancing the interest of the said party of the first part in such manner as may be directed by the officers of said company.

It is further understood and agreed, that if the said party of the second part has at any time held any relation to this company as agent or subagent, or broker, or otherwise, that the acceptance of this appointment will be understood to be and shall be independent thereof, and as an abrogation and annulling of such relation in every respect, and said party of second part shall act as attorney and counsellor at law solely under this appointment and contract.

Either party hereto may terminate this agreement and the appointment hereunder, unless the same be sooner terminated by death of said party of second part, or by mutual consent, at any time during its continuance, by giving to the other party thirty days' notice, in writing, to that effect.

In witness whereof the said party of first part, has hereunto in duplicate, caused the same to be executed by its president and secretary; and the said party of second part has hereunto, in duplicate, set his hand and seal, this first day of April, 1878.

(Signed)

JOHN E. DE WITT, *President.*

J. P. CARPENTER, *Secretary.*

ROBT B. KENDALL.

Sealed and delivered in presence of—

H. HOWARD BENIDICT.

EXHIBIT 3, F. V. C.

Know all men by these presents that the Union Mutual Life Insurance Company, a corporation established by and under the laws of the State of Maine, hereby constitute and appoint Robert B. Kendall, of Chicago, in the county of Cook and State of Illinois, attorney-at-law, their true and lawful attorney for them and in their name and stead to sign, seal, acknowledge, and deliver all such bonds as are required by the State of Illinois to be given by
197 the said company as security for costs and expenses when the said company commences a suit at law in said State for the recovery of property or the collection of any claim or demand arising under mortgages held by said company.

Hereby granting unto him, said attorney, full power and authority to their name and behalf to sign, seal, acknowledge, and deliver any and all deeds which he may deem necessary or proper in the premises and otherwise to act in and concerning the premises as fully and effectually as they might do if personally present.

In witness whereof the said Union Mutual Life Insurance Company hereunto set their hand and corporate seal this fourth day of August, in the year of our Lord one thousand eight hundred and seventy-seven, by its president, John E. De Witt, thereunto duly authorized.

(Signed)

[*UNION MUTUAL LIFE INS. CO.
JOHN E. DE WITT, *Pres't.*] (L. S.)

[* Words enclosed in brackets erased in copy.]

[Written across the face in red ink:] Revoked and returned by Kendall in his letter of August 20, '77.

Signed and sealed in presence of—
(Signed) H. D. SMITH.

COMMONWEALTH OF MASSACHUSETTS, }
Suffolk, } 88 :

BOSTON, 4th of Aug't, 1877.

Then personally appeared the above-named John E. De Witt, president, and acknowledged the foregoing instrument to be his free act and deed before me.

(Signed)

CHAS. D. ROHAN,
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS,
SECRETARY'S DEPARTMENT, BOSTON, April 14th, 1874.

I hereby certify that on the thirteenth day of August, 1872, Charles B. Rohan was appointed and commissioned and on the twelfth days of September, 1872, duly received the qualifying codes oath thereunder as a justice of the peace for the county of Suffolk, in the said Commonwealth, for the term of seven years from the date of said commission, and that to his acts and attestations as such full faith and credit are and ought to be given in and out of court.

In testimony of which I have hereunto fixed the seal of the Commonwealth.

(Signed)
[L. s.]

OLIVER WARNER,
Secretary of the Commonwealth.

Memorandum of an agreement made and entered into this 18th day of September, A. D. 1876, by and between Edwin A. Warfield, of Boston, in the Commonwealth of Massachusetts, of the first part, and the Union Mutual Life Insurance Company, a corporation created by the laws of the State of Maine and having an office at Chicago, in the State of Illinois, of the second part.

The said party of the first part hereby agrees with the party of the second part to act as its agent at Chicago aforesaid for the collection of moneys loaned by it in the State of Illinois aforesaid and for the general management of the affairs of said company in relation to its loans and the securities therefor according to such written instructions as shall be from time to time given to him by said party of the second part or its executive officer, and said second party hereby agrees to pay said party of the first part in full for his services the sum of \$416.66 dollars a month payable monthly.

This agreement shall continue in full force until thirty days after notice by either party to the other to terminate the same and no

longer, and all existing contracts between the parties are hereby abrogated.

(Signed)

JOHN E. DE WITT, *President.*
E. A. WARFIELD.

Witness:

E. R. SECCOMB.

EXHIBIT 5, F. V. C.

CHICAGO, ILL., *March 3d, 1877.*

Union Mutual Life Insurance Company, Boston, Mass.:

We have no abstract in the following cases for foreclosure in court: No. 682, Kirchoff. * * * The Kirchoff deed contains or involves, rather, seven different titles.

The abstract, he say-, was burnt up in his office. I had Handy, Simmonds & Co. estimate on labor, and they say new abstracts will cost regular rates—about \$1,746.00. They will allow us a discount of 20% in consideration of ordering so many at once. The Kirchoff abstracts make up about \$1,000.00 of the \$1,726.00.

I see no way of advoiding this expense, but as it is so large I thought I would write for instructions before order- the lot. Our bill for abstracts will be immense.

Yours truly,

(Signed)

ROBT B. KENDALL.

EXHIBIT 6, F. V. C.

CHICAGO, ILL., *March 19, 1877.*

U. M. L. Ins. Co., Boston, Mass.:

In reply to letter of the president, 16th inst., relative to loan 682 I have to say that the entry of foreclosure, May 26, '76, was an error.

199 It should have been ordered foreclosed May 26, '76, at which time by reference to Mr. Seccomb's book you will see that he ordered Dr. Boone to foreclose.

I made a mistake in reading his memo. book and entered a memo. on my docket foreclose, &c., in several cases at that time, which I afterwards corrected in part, at least.

I was trying hard at that time to find out the status of cases where papers had been sent away and nothing but a pencil memo. on the envelope to show why or where they were sent.

Very respectfully, &c.,

(Signed)

ROBT B. KENDALL.

EXHIBIT 7, F. V. C.

CHICAGO, ILL., *April 3d, 1877.*

Union Mutual Life Insurance Company.

GENTLEMEN: By referring to our dail- statement of yesterday you will find \$100 collected on acc't of interest, loan No. 682, Kirchoff and Diversy. I have said to Mr. Kirchoff that it would be neces-

sary for him to pay about \$600 per month if he wanted any further time in which to sell the property; that would keep the interest from getting any larger. He seems to think that he can do that by making small payments and he started off with \$100 on acc't. I have given him to understand that by paying about \$600 per month that the Co. would put off foreclosure proceedings for a time.

Yours truly,
(Signed)

E. A. WARFIELD, *Ag't.*

EXHIBIT 8, F. V. C.

CHICAGO, ILL., *April 25, 1877.*

Union Mutual Life Ins. Co.

GENTLEMEN: We add to package of papers sent by express this date the following fire-insurance policies:

* * * * *

No. 682, Kirchoff & Diversy, Shoe & Leather No. 100,628, \$1,500.00, April 1st, 1878.

No. 682, Kirchoff & Diversy, Prescott, No. 1605, \$1,500, April 1st, 1878.

Yours truly,
(Signed)

E. A. WARFIELD.
T.

EXHIBIT 9, F. V. C.

CHICAGO, ILLS., *May 4, 1877.*

Union Mutual Life Insurance Company.

GENTLEMEN: Herewith please find fire-insurance policies as follows:

* * * * *

200 682, Kerchoff & Diversy, fire assu., No. 108,344, \$3,000, Dec. 13, '77.

* * * * *

Yours truly,
(Signed)

E. A. WARFIELD, *Ag't.*

EXHIBIT 10, F. V. C.

CHICAGO, ILL., *May 9th, 1877.*

Union Mutual Life Insurance Company.

GENTLEMEN: Referring to loan 682, Kirchoff and Diversy, will say it seems to be rather doubtful about collecting \$600 per month from them on acc't of interest. In fact, I have not been able to collect anything since April 2nd last. However, I have not lost sight of the matter.

Yours truly,
(Signed)

E. A. WARFIELD.

P. S.— * * *

EXHIBIT 11, F. V. C.

CHICAGO, ILL., *May 12, 1877.*

Union Mutual Life Insurance Company.

GENTLEMEN: Referring to loan 682, Kirchoff & Diversy, will say that Mr. Kirchoff gave me his check today for \$200.

The check is dated 18th, and as we cannot deposit it until that day it will not appear in our daily statement until then.

Yours truly,

(Signed)

E. A. WARFIELD, *Ag't.*

EXHIBIT 12, F. V. C.

(Copy.)

CHICAGO, ILL., *July 5th, 1877.*

Union Mutual Life, Boston, Mass.:

I have had search made for judgments against Kirchoff and wife & mother-in-law Diversy, with the following result:

Total am't judg'ts <i>vs.</i> Julius Kerchoff.....	\$11,015 80
" " " " Elizabeth Kirchoff.....	1,952 14

Of the last amount it appears from the records of the recorder's office that \$1,583 has been satisfied, although the judg't docket does not show it, which leaves only \$369.14.

There are no judgments against Mrs. Diversy, who owned the farm at the time our trust deed was made and who is supposed to own it now.

The title to most of the property was in Elizabeth Kirchoff when the trust deed was given. The total valuation of all the property by Morey was \$76,480, and of this amount the lots standing in name of Julius Kirchoff make up the sum of \$10,000.

If upon examination no more serious objection to making new papers appears than the judgments against Mrs. Kirchoff they need not stand in the way of making a new deal.

The Kirchoffs could probably satisfy the judgments, but even were we to take title subject to these small amounts it might be better than the present state of affairs.

I hope Kirchoff will get up the abstracts, and if punching up will make him do so I'll see him well punched.

It will not be practicable to make new papers to convey the lots standing in the name of Julius Kirchoff on account of the judgments, and probably he don't own them. It will not take long, I think, to have an abstract made of the title to the farm, and it will probably not be very expensive.

Yours truly,

(Signed)

ROBT B. KENDALL.

EXHIBIT 13, F. V. C.

Copy.

Loan 682.

CHICAGO, *July 10, 1877.*

Union Mutual Life Insurance Co.:

I have just had an interview with Kirchoff. He says they are hunting up the old abstracts and he thinks most of them can be found. At any rate, he hopes to find enough to materially reduce the expense. He professes to be highly pleased with the proposition made him and says he will use every endeavor to bring matters to a settlement on the proposed basis. He seems to be in earnest, and I think we are safe in allowing him a reasonable time to get his abstracts.

I will endeavor to get the farm title as soon as possible, but don't want to alarm him by appearing anxious about that particular part of the transaction. The only risk seems to be the death meantime of the old lady.

Very resp'y, &c.,

(Signed)

ROBT B. KENDALL.

EXHIBIT 14, F. V. C.

Copy.

Loan 682.

CHICAGO, *Sept. 18th, 1877.*

Union Mutual Life Insurance Company, Boston, Mass.:

We found so many diverse and adverse interests in the Kirchoff case that it has been impossible to so harmonize them as to effect a settlement on the basis proposed by the pres't when here.

202 Son-in-law Weckler did not advise mother-in-law Diversy to make herself liable a second time for her son-in-law Kirchoff; hence she has declined to do more than sign a \$10,000 note, secured by a trust deed on her farm.

This did not seem to Mr. Warfield and myself a sufficient inducement to release her from her liability for over 75,000 on the note we now hold, upon which we could enter up a judgment any day, which would be a valid lien on the farm, whether our trust deed is so or not. Mrs. Diversy acts under the advice of Weckler, and Kirchoff has no influence with her whatever.

We had an interview yesterday with Wickler, at which he said that a \$10,000 mortgage on the farm and her release from any further liability was their ultimatum, but when I told him that in that case we should have to enter up judgment *vs.* Mrs. Diversy on our note we thought he exhibited signs of weakening. He began to refer to a suggestion of mine, made some time ago, for a \$15,000 loan on the farm. I think they would give it. I think they are

anxious to get Mrs. Diversy released from her liability on the old note, and I suspected from his manner that he did not know until then that we held her judgment note. He told us of some other land she owned, which he said was unincumbered, lying near the farm.

After having alluded to the matter of taking judgment we thought it would be best to clinch the matter by entering it up at once, and I accordingly entered up a judgment against Mrs. Diversy alone for the sum of \$75,696.89, principal and interest due, and also for fees and costs, and ordered an execution.

Kirchoff has been through bankruptcy since he gave us that note, although he has not got his discharge. I see from an examination of the case that his discharge was applied for long ago, and that the register reported in favor of it, and that there was no opposition. It would therefore seem that he could get it any day. He is probably unwilling to settle the costs. At the time the note was signed Mrs. Kirchoff had no capacity to make a contract except as to her separate estate on account of her coverture, and I do not think a judgment *vs.* her would hold.

Married women were at that time in this State still under the common-law disabilities as to making contracts (except as I have mentioned). Her trust deed executed with her husband would probably be good, but her note, not being a contract relative to her "separate estate," would not be worth a cent.

Therefore I thought it best to take judg't against the widow Diversy alone.

I think it very likely that the parties will now come to time upon most any reasonable basis. I infer so chiefly from Wickler's manner when I mentioned judgment to him yesterday. At any rate, we have a pretty solid lien on the farm and upon any other real estate of Mrs. Diversy.

Yours resp'y, &c.,

(Signed)

ROBT B. KENDALL.

203

EXHIBIT 15, F. V. C.

CHICAGO, ILL., *February 11th*, 1878.

Union Mutual Life Ins. Co.:

* * * * *

No. 682, Kirchoff, we find that we have no title to 12 lots in "Knoke and Gardiner's subdivision," which takes \$17,380 out of Morey's valuation and \$20,000 from Rees' valuation. Otherwise the valuations are correct, except if made now the average reduction would be 15 % below the valuations of 1876. * * *

Yours truly,

(Signed)

E. A. WARFIELD,
Financial Agent.

G.

(Letter-head of original.)

Union Mutual Life Ins. Co., No. 133 La Salle street, room 15.

John E. De Witt, J. P. Carpenter, E. A. Warfield, financial agent;
R. B. Kendall, attorney.

EXHIBIT 16, F. V. C.

Union Mutual Life Insurance Co., 133 La Salle street, room 15.

John E. De Witt, president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

CHICAGO, ILL., *Feb'y* 19, 1878.

Union Mutual Life Insurance Co.:

In reply to the pres't's favor of the 13th inst. relative to No. 682, Kirchoff, will say that Kirchoff had no title to the 12 lots referred to in my letter of the 11th inst.

Consequently the judgment does not reach them.

Yours truly,

(Signed)

E. A. WARFIELD,
Financial Ag't.
SCOTT.

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EXHIBIT 17, F. V. C.

Union Mutual Life Insurance Co., 133 La Salle street, rooms 19, 20,
21.

John E. De Witt, president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

(Copy.)

682.

CHICAGO, ILL., *August 9th*, 1878.

Union Mutual Life Insurance Company, 153 Tremont St., Boston:

In reply to that part of the president's favor of the 6th inst. relative to Mr. Rees' appraisal papers on loan 682, will say that all papers relative to that loan are in the hands of Mr. Kendall, to whom above letter has been referred.

The \$2.40 referred to we paid Mr. K. for railway and carriage hire in taking Mr. Rees to the premises.

Yours truly,

(Signed)

E. A. WARFIELD,
Financial Agent.
G.

EXHIBIT 18, F. V. C.

CHICAGO, ILL., August 9th, 1878.

Union Mutual Life Insurance Company, 153 Tremont St., Boston :

I have Mr. Rees' valuation of the lot of land owned by Mrs. Diversy (one of the parties to loan No. 682, Kirchhoff), upon which to Co. secured a first lien under the judgment recovered *vs.* Diversy, and which land is not included in trust deed No. 682.

He valued the land at three hundred dollars per acre (\$300), but neither he nor I can tell just how many acres there are, and there seem never to have been any measurements given in conveyances of the land. It was called 20 acres and $\frac{3}{100}$ on the assessor's plat, and there has been a strip 2 chains wide sold off one side. Not knowing the length of the lot, we cannot tell how many acres the strip included; should think, however, there must be 15 acres at least, remaining.

Meantime there has been a new development in the Kirchhoff & Diversy matter. I have been notified that an old suit which was brought by the administratrix of one Johnson against Michael Diversy (the husband of Mrs. Angela Diversy) in 1861, and which has been pending in the courts ever since, has lately been decided in favor of the complainant and against the adm'x of Diversy's est., and that the claim constitutes a *a priori* lien on Diversy estate to our trust deed. The decree is for nearly \$8,000.

Nearly all the property in the Kirchhoff and Diversy trust deed was inherited by Mrs. Kirchhoff from her father (Michael Diversy) and was set off to her in a partition among the heirs.

The farm was the separate property of Mrs. Diversey and was no part of the estate of her husband.

The estate had not been settled at the time our loan was made, but was formally declared settled in 1873 by the county (probate) court. The decree in the suit above mentioned declares the settlement in 1873 fraudulent so far as the complainant is concerned and reopens it.

I have examined the records of the suit, a copy of which was furnished me by complainant's solicitor. The def't has appealed to the supreme court. The decision was on an appeal from the superior to the appellate court and confirms in substance the decision of the lower court. The decision by the appellate court was rendered Aug. 1st (instant). I never heard of the case before. Our abstracts — settlement of the Diversy estate, but nothing relative to this suit. I shall have to examine the matter more thoroughly; but it looks as though we were in a bad position. This, of course, precludes any settlement with Kirchhoff and Diversy by deed from them, unless we are willing to take subject to the suit or rather the decree.

Very respt. submitted.

(Signed)

ROB'T B. KENDALL.

(Letter-head of original.)

Union Mutual Life Ins. Co., No. 133 La Salle street, room- 19, 20, 21.
 John E. De Witt, *P.* president; J. P. Carpenter, secretary; E. A
 Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 19, F. V. C.

(Copy.)

Loan 682.

SEPT. 24, 1878.

* * * No. 682. Kirchoff.

Filed replication to answer of Diversy.

(Signed)

ROBT B. KENDALL.

EXHIBIT 20, F. V. C.

Rob't B. Kendall, att'y-at-law, room 21 Boone block, 133 La Salle
 street.

CHICAGO, *October 4th*, 1878.

The Union Mutual Life Insurance Company, Boston, Mass. :

In the trust deed of Kirchoff & Diversy, dated May 8th, 1871, to
 secure payment of loan No. 682, were included certain lots, to wit,
 lots 4, 5, 6, 7, 8, and 9, which had been conveyed to Kirchoff
 206 in April, 1870, by one Dorothea Volkman, who, in December,
 1870, filed a bill in chancery to enforce a vendor's lien upon
 said lots for non-payment of purchase-money.

The suit was pending at the time the loan to Kirchoff was made,
 and the company were chargeable with the notice thereof, and, of
 course, took the security subject to the result of the suit.

A decree of sale was made by the court in June, 1871, and, per-
 suant to said decree, the lots were sold by a master in chancery and
 purchased by the said Dorothea Volkman, and deeds were duly ex-
 ecuted and recorded conveying the same to her.

Kirchoff and *ux.* afterwards executed a deed to Volkman.

It would seem, therefore, that the company had no lien upon
 these lots.

Mrs. Volkman has lately requested that a release be executed and
 delivered to her by Dr. Boone, the trustee named in the trust deed,
 and President De Witt, being now here and fully advised in the
 premises, has consented to its being done.

A release has accordingly been prepared, and Dr. Boone has exe-
 cuted the same.

Please make a note of the above on your records.

I am, yours very respectfully,

(Signed)

ROBT B. KENDALL.

EXHIBIT 21, F. V. C.

CHICAGO, ILL., October 21st, 1878.

Union Mutual Life Insurance Company, 153 Tremont St., Boston :

Responding to president's favor of 4th inst. * * * No. 682.

* * * Properties have been valued and the papers are in the hands of Mr. Kendall. * * *

Other matters will receive attention.

Yours truly,

(Signed)

E. A. WARFIELD,
Financial Agent.

G.

(Letter-head of original.)

Union Mutual Life Ins. Co., No. 133 La Salle street, rooms 19,
20, 21.

John E. De Witt, president ; J. P. Carpenter, secretary ; E. A. Warfield, financial agent ; R. B. Kendall, attorney.

EXHIBIT 22, F. V. C.

(Copy.)

Loan 682.

CHICAGO, Oct. 24, 1878.

No. 682, Kirchhoff. Oct. 4 wrote H. O. about having released
lots 4, 5, 6, 7, 8, & 9. See letter.

(Signed)

ROBERT B. KENDALL, *Att'y.*

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EXHIBIT 23, F. V. C.

Robert B. Kendall, counsellor-at-law, room 21 Boone block, 133 La
Salle street.

CHICAGO, October 26th, 1878.

The Union Mutual Life Insurance Company, Boston, Mass. :

I have your favor of the 23rd inst. to hand, and, as requested,
hand you valuation papers as under * * * loan 682, Kirchhoff.
Original valuation inclosed * * *

I am, yours very respectfully,

(Signed)

ROBT B. KENDALL.
J. W.

EXHIBIT 24, F. V. C.

(Copy.)

Loan 682.

OCT. 31, 1878.

* * * Oct. 22 sent to Co. warranty deed, Diversy to Co.

(Signed)

R. B. KENDALL.

EXHIBIT 25, F. V. C.

CHICAGO, ILL., Nov. 8th, 1878.

Union Mutual Life Insurance Company, 153 Tremont St., Boston, Mass. :

Referring to letter of pres't, Nov. 5, by "F. N.," # 682, I regarded as a suggestion rather than a request as to having land surveyed, mentioned in your letter of Aug. 4th ult., and as I couldn't see any particular use in going to the expense of surveying Mrs. Diversy's land, upon which we had merely a judgment lien, about which nothing could be done at present, and as we knew pretty nearly how much land there was, I have not thought it expedient to go to the expense of a survey. However, if my course in the matter is not approved, I will order a survey.

In regard to the judgment of \$8,000 *vs.* the adm. of Diversy's est., the def'ts have appealed to the supreme court of this State, and the case is still pending. Meantime we have only to wait and let the parties fight it out, and then fight plaintiff (if she wins) when she tries to satisfy her decree out of our property, or compromise, as may then seem best.

* * * * *

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(Letter-head of original.)

Union Mutual Life Ins. Co., No. 153 La Salle street, room- 19, 20, 21.

John E. De Witt, president ; J. P. Carpenter, secretary ; E. A. Warfield, financial agent ; R. B. Kendall, attorney.

EXHIBIT 26, F. V. C.

CHICAGO, ILL., November 22d, 1878.

Union Mutual Life Insurance Company, 153 Tremont St., Boston :

I send you by express today the sworn valuations by Rees, Morey, and myself of the company's property situated in this State, which report is contained in 26 pages.

* * * * *

I also send a report of valuations made on certain lands, which you will find contained in twenty-nine pages. The farm which is held in No. 682, Kirchoff, is not valued. Mr. Rees figures on this being \$20,000, which I think is too high.

* * * * *

So far as the real-estate report is concerned, will say that the company has the benefit of a careful consideration as to the value given.

In my opinion, some of the outside property is valued a little too high. * * *

Respectfully submitted.

(Signed)

E. A. WARFIELD,
Financial Ag't.
G.

(Letter-head of original.)

Union Mutual Life Ins. Co., No. 133 La Salle street, room- 19, 20, 21.

John E. De Witt, president ; J. P. Carpenter, secretary ; E. A. Warfield, financial agent ; R. B. Kendall, attorney.

EXHIBIT 27, F. V. C.

CHICAGO, ILL., Nov. 30th, 1878.

Union Mutual Life Insurance Company, 153 Tremont St., Boston :

Enclosed please find valuation papers, loans No. 150, No. 682, and No. 730, called for in president's favor of 14th inst.

Yours truly,
(Signed)

E. A. WARFIELD,
Financial Agent.
G.

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(Letter-head of original.)

Union Mutual Life Insurance Co., 133 La Salle St., rooms 19, 20, 21.

John E. De Witt, president ; J. P. Carpenter, secretary ; E. A. Warfield, financial agent ; R. B. Kendall, attorney.

EXHIBIT 28, F. V. C.

CHICAGO, ILL., December 14th, 1878.

Union Mutual Life Insurance Company, 153 Tremont St., Boston :

Please honor my demand draft of this date, \$585.93, to the order of D. G. Hamilton, on account of Chicago taxes, the same being for four tax deeds to Mr. Sharp, as follows :

* * * * *

No. 682. Kirchoff, John Forsythe, and ux. to D. S., \$45.

* * * * *

The above deeds have been delivered to Mr. Kendall, with instructions to prepare deed from Mr. Sharp to the company.

Yours truly,
(Signed)

E. A. WARFIELD,
Financial Ag't.
G.

(Letter-head of original.)

Union Mutual Life Ins. Co., No. 133 La Salle street, rooms 19, 20, 21.

John E. De Witt, president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 29, F. V. C.

CHICAGO, ILL., *January 1st, 1879.*

Union Mutual Life Insurance Company, 153 Tremont St., Boston:

In reply to favor of vice-pres't of 20th ult. saying the pres't and himself wish me to associate Mr. Sleeper with myself in Mason (1165), Burroughs (730), Campbell (1044), and Kirchoff (682) cases.

* * * * *

There has not been much delay in the Kirchoff case, except that Mr. Barber, counsel for Diversy, was running for Congress, and I was obliged, as a matter of courtesy, to grant him a little extra time in which to prepare and file his answer; that has, however, been done, and the case is at issue and will be referred to a master to take proof and report without further delay. If the case then develops great difficulty, I will retain Mr. Sleeper, but in its present stage it seems unnecessary. I have hopes of effecting an amicable settlement and avoid litigation, but have not got such terms from Diversy as to care to submit them to your consideration. Mrs. Diversy's adviser (Wicker) says that it is with her a question of saving something from the property she pledged as security for Kirchoff's debt, and that if we are not willing to concede anything she might as well fight for what she can get. I think now that an offer on our part to let her keep 40 acres of that farm would induce her to give us a deed of the rest, although she has not said so.

Wickler, with whom I have had several interviews during the last month, offered, in her behalf, to divide the farm betw. us (130 acres). You are, I think, sufficiently informed of the various complications in this matter, so that I need not state them fully. I explained them fully to Mr. Sharp, and have written fully to the company. I think we can maintain our case in court, but we may have a long seige of it. Kirchoff would willingly surrender all his property and make an arrangement to buy back his homestead at a liberal price, but I do not dare to settle with him without settling the whole case, as it might prejudice our claim against Diversy. It is rather unfortunate, now, that Boone released part of the security without adequate consideration, thus leaving more than a fair proportion to be satisfied out of the remainder, and we cannot safely take Kirchoff's property for a certain part of the debt and then hold Mrs. Diversy for the bal. It would give cause for complaint on her part, and our idea of the relative value of the different parcels of land might not be sustained by the court.

A receiver of the property has been appointed and the rents will be collected by him. Kirchoff has taken a lease of his own house from the reev. I wrote in my report for November about this case and the matter was referred to the vice-president, then here, but he did not appear to favor a settlement involving any concession on our part, but did not say so decidedly.

Of course any settlement would involve some concessions on both sides.

If it is not thought advisable to negotiate I will give no further thought to the subject, but will push the court proceedings as fast as may be, but I would like a hint of your views in the matter. * * *

Very resp'y,
(Signed)

ROBT B. KENDALL.

(Letter-head of original.)

Union Mutual Life Ins. Co., No. 133 La Salle street, rooms 19, 20, 21.

John E. De Witt, president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 30, F. V. C.

(Copy.)

Loan 682.

CHICAGO, ILL., *January 2d*, 1879,

Union Mutual Life Insurance Company, 153 Tremont street, Boston:

President's favor of 20th ult. to Mr. Rees, Mr. Morey, and myself is at hand and the contents have been carefully noted. I desire to say in regard to the Kirchoff valuation loan 682 that the description to the farm property of 135 acres seems to have been omitted in copying the report, consequently the value of that portion was not given. Mr. Rees and Mr. Morey seem to be firm in their opinion that the 135 acres are worth \$20,000.

For myself I cannot consistently say over \$13,500 or \$100.00 *pre* acre. Mr. Rees originally valued the Kirchoff property at \$83,000. This valuation embraced 6 lots in Knokke and Gardner's subdivision, which is omitted from the last valuation. These lots were valued at \$10,000. The farm was then put at \$25,000. The valuation of the Kirchoff property except the farm is placed now at \$39,100. Mr. Rees and Mr. Morey increased this amount by \$20,000 for the farm, making their total valuation \$59,100. I should place the farm from present information at \$13,500, making the total value of the Kirchoff property \$52,600. There has been some property released from this loan, since it was made which would reduce the figures somewhat from the original valuation made in 1871.

Yours truly,
(Signed)
28—155

E. A. WARFIELD.

EXHIBIT 31, F. V. C.

CHICAGO, ILL., Jan. 14th, 1879.

U. M. L. Ins. Co., Boston, Mass.:

I have Vice-Pres't Sharp's favor of the 8th inst., and in reply

* * * * *

In regard to settlement of the Kirchoff case, do I understand the vice-pres't to refer to the suit now pending in the supreme court of this State—Johnson *vs.* Diversy—when he speaks of "Mrs. Diversy's suit"? If so I have to say that a settlement such as suggested cannot be made to cover that case, altho' it would cover everything else.

We cannot make Johnson a party to our settlement. That suit, however, does not affect the title to the Diversy farm, which was the separate property of Mrs. Diversy, but does affect the title to all the other land in the trust deed, which was the property of Mr. Diversy, the suit being against his adm'r.

There is a large amount of other property affected by that suit. Mrs. Kirchoff's share was $\frac{1}{4}$, I believe: If the suit is finally decided in favor of the pl'ff the claim becomes a lien on the whole estate.

Very resp'y, &c.,
(Signed)

ROBT B. KENDALL.

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(Letter-head of original.)

Union Mutual Life Ins. Co., No. 133 La Salle street, rooms 19, 20, 21.

John E. De Witt, president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 32, F. V. C.

Union Mutual Life Ins. Co., No. 133 La Salle street, rooms 19, 20, 21.

John E. De Witt, president; Daniel Sharp, vice-president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

CHICAGO, ILL., January 14th, 1879.

Union Mutual Life Ins. Co., Boston, Mass.:

The pres't will recollect that when he was last in Chicago he handed me a certain promissory note for the sum of \$1,500, which had been left by Kirchoff with Dr. Boone as collateral security for loan # 682, Kirchoff, Diversy, and which had been turned over by Boone to Mr. Warfield, upon which note was an endorsement to the effect that the note was not to become due until an abstract of title has been furnished and the title proved to be satisfactory. I have succeeded in finding the maker of the note, who lives out in the country and is a German. He says he has not yet been furnished with an abstract and his title is not satisfactory.

He claims to have paid out some \$600 to clear the land from tax claims and \$120 for abstracts, vouchers for which expenditure he exhibited. Kirchhoff confirms the statement. I have succeeded in getting from Kirchhoff one of the abstracts, which cost \$80 and was paid for by the maker of the note—Redelings—for which he should receipt. The other, for which he showed receipted bill for \$30, I have not got trace of, and don't think I shall. I can get a copy, however, from Handy & Co.

The title comes from the estate of Michael Diversy, and, like all the rest, is subject to the suit now pending against his adm'r. Redelings claims an offset against his note of the money paid out by him as aforesaid, and insists that his title be made satisfactory, which is quite difficult to do, as you will see.

He seems to be a very decent sort of a Dutchman, however, and would like to get up his note if it don't cost too much.

The note bears no interest until after due, and can't become due till the above-mentioned conditions are complied with. I have made so good an impression on him as to have him propose to be governed by my opinion as to his title, but I do not care to act for him to that extent for fear I should find more bad things in the title than he knows of now. He has got some money, he says, and I think I can make a decent sort of a compromise with him if you authorize it, for he don't want any trouble, and would like to take up his note.

Shall I make the best terms possible for cash and close the matter?

213 I think \$500 now would be better than to wait until he finds out about that old suit that is pending. He would insist on a settlement of that if he knew of it, but I don't think he does.

Perhaps I can do better; I would not advise taking less. Still, you must remember it is money without interest in its present shape, and we cannot perfect the title with that suit pending.

Resp'y, &c.,
(Signed)

R. B. KENDALL.

The land conveyed by Kirchhoff to Redelings was never included in our trust deed.

EXHIBIT 33, F. V. C.

CHICAGO, ILL., *January 23d, 1879.*

Union Mutual Life Insurance Company, Boston, Mass. :

I have today settled with Mr. Redelings the matter of his note for \$1,500, held by the company as collateral to the Kirchhoff loan No. 682, and have cancelled and surrendered the note.

He paid me nine hundred and twenty dollars (\$920), out of which I have to pay six dollars (\$6) to Handy & Co. for abstract, or, rather, duplicate of part of abs't, which had been lost by Kirchhoff or some one else. I have p'd over the am't to Warfield, to be credited on the Kirchhoff loan. This is a better settlement than my previous

letter led you to expect, and Mr. Warfield and myself think it a very good one.

Resp'y, &c.,
(Signed)

ROBT B. KENDALL

(Letter-head of original.)

Union Mutual Life Ins. Co., No. 133 La Salle street, rooms 19, 20, 21.

John E. De Witt, president; Daniel Sharp, vice-president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 34, F. V. C.

(Copy.)

Copied from Kendall's letter book of reports & Co.

Loan 682.

JANUARY 25TH, 1879.

* * * Kirchoff & D.

Jan'y 8.—Letter from pres't about this case.

Jan'y 14.—See Mr. K's reply.

Jan'y 14.—Wrote H. O. about Theodore Redelings' note.

Jan'y 23.—Settled with Redelings for \$920.

Handed cash to Mr. Warfield and note to Mr. Redelings; wrote H. O. result of negotiations. * * *

Respectfully submitted.

(Signed)

ROBT B. KENDALL

EXHIBIT 35, F. V. C.

(Copy.)

Copied from Kendall's letter book of reports to Co.

Loan 682.

JANUARY 31ST, 1879.

* * * No. 682, Kirchoff. The claim of Johnson, administratrix, against Diversy, administratrix, to which reference has been frequently made in correspondence to the company, was presented this day to the probate court and allowed by consent of Mrs. Diversy as a claim against the estate of Michael Diversy, and an order was entered, pursuant to the recent decision of the supreme court, setting aside the former order of the county court discharging the administratrix.

No proceedings have been commenced as yet to subject the real estate to the payment of this claim. When such proceeding shall be commenced we shall take the best measures we can think of to defeat the proceedings. I have come to the conclusion that in this case the Co. ought not to incur any liability until it is forced upon

them, and I have great hope that we will be able to make it exceedingly difficult for them to get the authority of court to sell any of the company's real estate. * * *

Respectfully submitted.

(Signed)

ROBT B. KENDALL.

EXHIBIT 36, F. V. C.

Loan 682.

MARCH 15, 1879.

* * * March 7 waited on Mr. Beattie, att'y for Chas. Saleman, who secured judgment *vs.* Kirchoff, execution dated Oct. 18, 1876, and marked No. 39 on abstract; also wrote him March 8. Beattie says judgment was satisfied; see also my letter of 21st relative to a settlement. * * *

EXHIBIT 37, F. V. C.

(Copy from letter-press books.)

CHICAGO, ILL., Aug. 7th, 1879.

Union Mutual Life Insurance Company:

In reply to letter of 5th inst., asking for list of parties against whom judgments for deficiencies have been obtained, I have the honor to transmit the following list of names and amounts of judgments or decrees.

* * * * *
Angela Diversy judg't, 75,704.39.

* * * * *
215 To be credited with am't bid at sale under chancery decree (less costs) and am't collect- from Wm. E. Frost on deficiency decree. * * *

I don't think the individual responsibility of any of the foregoing parties is worth ten cents.

Very respectfully, ob't serv't,
(Signed)

ROBT B. KENDALL.

Union Mutual Life Ins. Co., No. 133 La Salle street, rooms 19, 20, 21.

John E. De Witt, president; Daniel Sharp, vice-president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 38, F. V. C.

CHICAGO, ILL., October 22d, 1879.

Union Mutual Life Insurance Company, Boston, Mass.:

I beg to hand you herewith the following papers:

* * * * *

1. Warranty deed, Angela Diversy to company, loan No. 682, Kirchoff.

* * * * *
Yours respectfully,
(Signed)

ROB'T B. KENDALL

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kimball, attorney.

EXHIBIT 39, F. V. C.

CHICAGO, ILL., Nov. 1st, 1879.

Union Mutual Life Insurance Company :

Among a lot of deeds forwarded from this office today for execution by the company is one to Kirchoff of his "homestead lot," so called, which bears even date with the quitclaim deed given by Kirchoff and wife to the company.

There was an understanding between Mr. Warfield, Kirchoff, and myself that the Co. would sell this lot back to him and allow him to pay for it in installments, but so far as I know the price was not definitely fixed.

The consideration named in the deed I have prepared is the appraised value by Rees at time we visited all the Kirchoff property over a year ago.

If the company approved of selling to him at that price please execute and return deed and name terms of payment.

216 Kirchoff has expressed a preference for semi-annual payments account principal, but has always objected to paying anything down in cash, and I have always told him that the Co. would not like to sell without a payment in cash on delivery of deed.

So that is an open question as well as the price. He has never been near me since he delivered the quitclaim deed; but Mr. Warfield says he claims now that he was to have the privilege of buying back lot 4 also (Pine St.), but such has not been assented to by me in any way, for I have thought the redemption of his house and lot was as much as he ought to undertake.

In all my conversation with Kirchoff I have avoided fixing a price, but have told him what Rees' valuation was and said I would advise the Co. to reconvey at that price, and I do so advise accordingly.

In the first instance he said he would be willing (in order to make a settlement and get rid of his obligation to the Co.) to undertake the redemption of his homestead at even more than it was worth.

He now wants to include the lot on Pine St., making total consideration \$10,000. (So says E. A. W.) I don't think we are

under any obligation as to lot 4, even morally; and, as I understand it, we are under no obligation whatever as to his homestead, except to give him a chance to buy it back on such terms as the Co. were offering other property—*i. e.*, long-time installment, low rate of interest.

I don't believe he will pay any cash down, but think he would undertake to make a payment of $\frac{1}{20}$ on the first Apr. next.

I would suggest making him such terms with int. from date of deed and then have him either accept or decline and end it.

Very resp'y,

(Signed)

ROBT B. KENDALL.

Lot 4 is in demand, and Kirchhoff knows there is money in it at the appraised value or at the offer made by Isham some time ago (\$3,000).

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133^d La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 40, F. V. C.

CHICAGO, ILL., Nov. 8th, 1879.

Union Mutual Life Insurance Company, Boston, Mass.:

I have the president's favor of the 5th relative to the draft of deed sent by me to the Co. on the 31st ult. for conveyance of Kirchhoff's homestead lot to Mrs. Kirchhoff for \$7,000, &c.

I will communicate the Co.'s decision to Kirchhoff.

217 Perhaps the financial committee did well to disregard my advice.

I don't think Kirchhoff will purchase, but perhaps he will.

Very truly,

(Signed)

ROBT B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 41, F. V. C.

(Copy.)

Loan 682.

CHICAGO, ILL., November 26, 1879.

Union Mutual Life Insurance Company, 153 Tremont street, Boston:

I have waited some time in order that I might be able to report the settlement of No. 682, Kirchhoff, but cannot do so yet. I saw Mr. Kirchhoff a few days since and had him go with me to Mr. Ken-

dall's office, but found Mr. Kendall absent. Mr. K. agreed to meet me at Kendall's office the same afternoon at 4 o'clock and I have not been able to see him since.

He claims that he settled with Mr. Kendall with the understanding that he was to purchase the homestead on the terms submitted some time since by Mr. Kendall, and Mr. Kendall says such is not the case. I have possession of the house under a lease to Kirchoff, but he don't pay rent worth a cent.

Yours truly,

(Signed)

E. A. WARFIELD,
Financial Agent.

G.

EXHIBIT 42, F. V. C.

CHICAGO, ILL., Dec. 1st, 1879.

Union Mutual Life Insurance Company, Boston, Mass. :

I herewith beg to hand you the following deeds, &c. :

* * * * *

No. 682, 1 quitclaim deed, Julius and Elizabeth Kirchoff to company.

Loan 682, Kirchoff.

* * * * *

Yours respectfully,

(Signed)

ROB'T B. KENDALL.

218

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres. ; Daniel Sharp, vice-pres. ; J. P. Carpenter, secretary ; E. A. Warfield, financial agent ; K. B. Kendall, attorney.

EXHIBIT 43, F. V. C.

CHICAGO, ILL., December 6th, 1879.

Union Mutual Life Ins. Co., Boston, Mass. :

* * * * *

In regard to valuations asked for, will say that No. 682, Kirchoff, will not stand more than \$55,500. The homestead might stand an advance of \$1,000, but I should take that amount from the value placed on lot 4. I think the valuation of October 7th last is all the property can stand.

In regard to the tax vouchers called for, will say that Mr. Hamilton brought in \$800 worth yesterday, but I did not pay for them, as there were some certificates which did not belong to the company

and were taken back for the purpose of correcting the account. These certificates will go forward early in the week.

Yours truly,
(Signed)

E. A. WARFIELD,
Financial Agent.

G.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary.

EXHIBIT 44, F. V. C.

CHICAGO, ILL., ²Dec. 8th, 1879.

Union Mutual Life Insurance Company, 153 Tremont St., Boston :

In reply to president's favor of 5th inst., we have no means of knowing to what part of the Kirchhoff property the various items are chargeable, except by the vouchers, which are not in my possession. If you will send all of the vouchers we shall then be able to separate them.

Yours truly,
(Signed)

E. A. WARFIELD,
Financial Agent.

G.

219

(Letter-head of original.)

Union Mutual Life Insurance Co., 133 La Salle street, rooms 19, 20, 21.

John E. De Witt, president; Daniel Sharp, vice-president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 45, F. V. C.

CHICAGO, ILL., Dec. 9th, 1879.

Union Mutual Life Insurance Company, 153 Tremont St., Boston :

In reply to that portion of pres't's favor of 5th inst. asking for separate valuations on the Kirchhoff property have to say that I consider the relative value to be the same—that is, \$1,875.00 per acre.

E., 3.1 acres, \$6,000.

B., 12.5 " \$9,000.

Yours truly,
(Signed)

E. A. WARFIELD,
Financial Agent.

G.

(Letter-head of original.)

Union Mutual Life Insurance Co., 133 La Salle St., room- 19, 20, 21.

John E. De Witt, president; Daniel Sharp, vice-president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 46, F. V. C.

Union Mutual Life Insurance Company, 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

CHICAGO, ILL., Dec. 12, 1879.

Union Mutual Life Insurance Company:

I forward today by American ex. a copy of the opinion of the supreme court of this State in the suit of Johnson, adms., vs. Diversy, adms. (relative to the Kirchhoff-Diversy loan, No. 682), about which you have been already informed.

The decision affirms the decree of the lower courts, which, you know, was in favor of the complainant, Johnson.

Copy of the decree of the superior court is embodied in the abstract of the case in the appellate court, which I sent you once for examination and which was returned to me. See pages 12 to 17 of said abstract (printed), which I again forward for your reference.

220 Interest and costs are added to the amount found due as per decree of superior court, which make the am't of claim now due over \$8,000. I have not the exact figures.

Unless the decree is paid proceedings will be commenced in the probate court to sell real estate to satisfy it.

The def'ts see no way to prevent such sale, and Mr. Weckler, who is Mrs. Diversy's son-in-law and who has furnished most of the means for carrying on this suit for her, says he and the other heirs of Diversy (his wife and sisters) are willing to settle and pay their proportion of the claim.

The company represents the entire interest of one of the 4 heirs or $\frac{1}{4}$ of the estate of Diversy, and if we settle shall have to pay, as I understand, one-fourth of the claim.

The att'ys of Mrs. Johnson want very much to settle right away, as their fees have been largely contingent and they are hungry for their money.

A part of the claim has, I am told, already been paid by Wecker (\$1,500).

The att'ys of Johnson would like to know whether or not the company will make a settlement without putting them to the trouble of further proceedings.

I wish you to advise me as to that point, and then, if we are to

make an amicable settlement, I will arrange details, &c., and also see if we can get any discount.

I don't see any way of avoiding settlement at some time and it would not be advisable to incur additional expense. The liability seems to be well settled.

Very resp'y, &c.,

(Signed)

ROB'T B. KENDALL.

If the company prefer not to assume this liability till after 1st Jan'y, I can put them off till then.

(Signed)

ROB'T B. KENDALL.

Please return the documents as soon as sufficiently examined. The copy of opinion was loaned me.

(Signed)

R. B. K.

EXHIBIT 46, F. V. C.

CHICAGO, ILL., *December 13th*, 1879.

Union Mutual Life Insurance Company, 153 Tremont St., Boston :

Referring to that portion of president's favor of the 4th inst. relative to No. 682, Kirchhoff, will say that the company has a deed to the property, but I understand that foreclosure proceedings are still pending.

I am inforemed by Mr. Kendall that I can apply whatever moneys are in my hands in this case on account of taxes paid by the company, which I will do at once.

221 I will close the receiver's account with this property just as soon as I can do so.

Your- respectfully,

(Signed)

E. A. WARFIELD,

Financial Ag't.

W..

(Letter-head of original.)

Union Mutual Life Ins. Co., No. 133 La Salle street, rooms 19, 20, 21.

John E. De Witt, president ; J. P. Carpenter, secretary ; E. A. Warfield, financial agent ; R. B. Kendall, attorney.

EXHIBIT 47, F. V. C.

CHICAGO, ILL., *Dec. 23d*, 1879.

Union Mutual Life Insurance Company, 153 Tremont St., Boston :

As appears in our daily statement, the receiver has paid the company for 2 tax items on the Kirchhoff property, amounting, with cost, to \$230.50.

Please send the vouchers, \$114.45, \$2.87 costs, and \$110.42, \$2.76 costs.

Yours truly,

(Signed)

E. A. WARFIELD,

Financial Ag't.

G.

(Letter-head of original.)

Union Mutual Life Insurance Co., 133 La Salle street, rooms 19, 20,
21.

John E. De Witt, president; Daniel Sharp, vice-president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 48, F. V. C.

(Copy.)

Loan 682.

DECEMBER 31ST, 1879.

* * * Nov. 8th.—Filed for record deed from Kirchoff and wife to company. Received a letter from company in reply to mine of Oct. 31st, saying finance committee decline to sell Kirchoff his home-
stead for \$7,000, but will sell for \$8,400; $\frac{1}{4}$ cash, balance in 20 equal payments, at 6 % interest.

Nov. 17th.—Received letter from company, saying this matter must be fixed up before the end of the year.

Dec. 1.—Sent to company a quitclaim deed from Kirchoff and wife to company.

222 Dec. 12.—Sent home office a copy of opinion of supreme court in suit of Johnson vs. Diversy, together with abstract of the evidence and the decree of the court, with letter of explanation.

Received reply from Vice-President Sharp, dated Dec. 23d, saying that the opinion is returned by express and requesting me to lay it before President De Witt for his examination when in Chicago during Mr. De Witt's visit to Chicago.

I submitted the above-mentioned matter to him with such explanation of the situation that was then enabled to give, but no definite conclusion was reached as to the course to be pursued by the company.

Since then I have made further and more complete investigation of the matter, the report of which I embodied in a letter to the company on the 10th day of Jan'y, and asked for instructions, to which I have received reply, saying that the vice-pres. would be in Chicago in the course of a week or 10 days, and that I should refer the matter to him.

Respectfully submitted.

(Signed)

ROBT B. KENDALL

EXHIBIT 49, F. V. C.

CHICAGO, ILL., January 5th, 1880.

Union Mutual Life Insurance Company, Boston, Mass. :

Referring to your favors of the 5th and 17th ult. in reference to the certain items of expense that you desire to appear in proper amounts against the different prices of the Kirchoff property, No. 682, I beg to hand you below the information required.

Report.

Voucher for \$6, p'd Feb'y 3, '79. (Signed) Handy & Co.
 Voucher for \$10, " June 14, '79. (Signed) E. R. Bliss.
 Voucher for \$29, " Aug. 9, '79. (Signed) Rob't B. Kendall.
 Voucher for 90c., " Nov. 8, '79. (Signed) Rob't B. Kendall.
 Voucher for \$5, " July 10, '78. (Signed) Rob't B. Kendall.
 Each of the five foregoing vouchers refer- to the whole of the
 Kirchhoff property.

Voucher for \$5.00, p'd Mar. 16, '78. (Signed) Handy, Simmons
 & Co.

Voucher for \$28.00, " Sept. 20, '77. (Signed) Handy, Simmons
 & Co.

Voucher for \$1.65, p'd Sept. 12, '79. (Signed) Rob't B. Kendall.

Voucher for \$17.50, " Sept. 17, '77. (Signed) Rob't B. Kendall.

Voucher for \$2.40, " July 29, '78. (Signed) Rob't B. Kendall.

Each of the five last vouchers covers the Kirchhoff farm.

Voucher for \$88.00, p'd June 3, '78. (Signed) Handy, Simmons
 & Co. On lots 1, 2, 3, 10, 11, & 12, block 4, Knokke & Gardner's
 subd'n, &c.

\$33.00, order No. 31055. Bl'k 12 & 3 $\frac{1}{16}$ acres bl'k 3, L. & Di-
 versy, &c.

\$38.00, order No. 31051. Lot 26, bl'k 28, sec. 5, 39, 14.

223

Voucher for \$244,

\$40.00, order No. 31052.

Lot 10, bl'k 64, original town.

p'd Febr'y 22, '78.

\$85.00, order No. 31053.

(Signed) Handy, Simmons & Co. Lots 2 & 4, bl'k 21, L. W. $\frac{1}{4}$,
 3, 39, 14.

\$48.00, order No. 31054. Lot 3, in bl'k 53, Kinzie's add'n.

Voucher for \$153.40, p'd March 14, '78. (Signed) John N. Young.
 Lots 2 & 4, in W. part of bl'k 21, in Canal Trustees' subd'n of S. frac.
 $\frac{1}{4}$ sec. 3, 39, 14.

Voucher for 70c., p'd March 14, '78. (Signed) Rob't B. Kendall.
 Covers lot 3, in (except S. E. cor.) bl'k 53, Kenzie's add'n to Chic.;
 also lots 3, 10, & 11, bl'k 4, in Knokke & Gardner's subd'n of 20
 acres N. and adjoining the S. 30 acres of W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ sec. 28,
 40, 14.

Voucher for 65c., p'd June 5, '79. (Signed) Rob't B. Kendall.
 Covers lots 1 & 2, bl'k 4, Knokke & Gardner's sub. of part of W. $\frac{1}{2}$
 of N. W. $\frac{1}{4}$ sec. 28, 40, 14.

Voucher for \$60-100, p'd Aug. 25, '79. (Signed) R. B. Kendall,
 by J. W. Covers lots 2 & 4, in W. $\frac{1}{2}$ of bl'k 21, in Canal Trustees'
 sub. of S. pac. $\frac{1}{4}$ sec. 3, 39, 14 E.

Voucher for \$20.00, p'd Sept. 17, '77. (Signed) Rob't B. Kendall.
 Covers lots 2 & 4, bl'k 21, S. E. 39, 14; also lot 26, Rose's subd'n E.
 $\frac{1}{2}$ bl'k 28, Canal Trustees' subd'n, in sec. 5, 39, 14; also farm in T.
 42, 13.

Voucher for \$17.40, p'd Sept. 20, '77. (Signed) J. H. Gallery.
 Covers lot 3, Buttler's subd'n of N. E. $\frac{1}{4}$ bl'k 53, Kinzie's add'n to
 Chi.; also lot 10, bl'k 64, original town.

Voucher for \$1.00, p'd June 11, '78. (Signed) Robert B. Kendall.
 Covers farm in T. 42, 13 E.

With reference to these vouchers relating to taxes, it will not be

necessary for me to send description, as the property is described in full on each tax voucher.

Yours respectfully,
(Signed)

E. A. WARFIELD, *Fin'l Ag't.*
W.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 50, F. V. C.

(Copy.)

Loan 682.

CHICAGO, ILL., *January 10th, 1880.*

Union Mutual Life Insurance Company, 153 Tremont street,
Boston:

In the matter of the suit of Johnson against Diversy to establish a claim against the administratrix of Michael Diversy, 224 through whom title to most of the land described in the Kirchhoff and Diversy trust deed, No. 682, is derived, I have to report as follows: The attorneys for Mrs. Johnson have been pressing me for a final decision as to what course the company will take in this matter, and I have put them off from time to time in order to make more investigation in the case than I have hitherto been able to do.

The amount of the decree entered by the superior court Oct. 9, '77, is \$7,612.00, to which sum should be added interest at the rate of 6 % per annum to the present time or to date of payment of the decree, whenever that may be.

Interest computed to this date amounts to \$1,027.62, which makes the total claim \$8,639.62.

As the trust deed to Dr. Boone conveyed substantially a quarter in trust in the real estate left by Diversy, it is insisted by the attorney for Mrs. Johnson that the company should assume and pay $\frac{1}{4}$ of the amount of the decree, with interest. Something also has been said about our paying a part of the expense of litigation, but they do not seem disposed to insist upon that. Upon payment of one-quarter of this amount, to wit, \$2,159.90, they purpose to release all the property in which the company is interested from any further liability, and I am informed that arrangements have been made with Mr. Weckler, the husband of one of the Diversy heirs, who still retains a large interest in the property, to pay the balance of the claim, and undertake to indemnify themselves by contributions from the owners of the other half of the property.

Part of the Co.'s security has been released from time to time, so that we don't now represent $\frac{1}{2}$, but would have a claim on the land released for an equitable contribution, I think.

It is a well-settled principal of law that heirs (including, of course, those claiming through them) are not liable for the debts of their ancestors where the latter leave personal estate sufficient to discharge all just debts, and so forth, and that it devolves on those seeking to charge the heir with ancestors' debts to prove either that there was no personal estate or that it was insufficient to pay the just demands against his estate.

It has also been held by courts that if the estate has been wasted and destroyed by the administrator he and his surety are liable to the extent of the waste and not the land of the heirs, even if both administrator and surety are both insolvent.

The supreme court, in the case now under discussion, found that at the time the administratrix closed her account she held 1,160 shares of the capital stock of the Lill Chicago Brewing Co., par value \$100, and that the proofs showed that said shares of stock were of amply sufficient value to pay and satisfy this decree, and that she kept and retained in her possession over \$15,000 (to wit, said stock) of personal assets, which the court found she has ever since held, and that all the other debts of Diversy have been paid.

I have made a careful examination of the records of the probate court of this county in the matter of administration on the estate of Diversy and find that the administrator's final account shows that she had \$2,411 in cash and 1,280 shares of said stock, but 225 that she distributed the money and the stock among the 4 heirs and herself. While this was, under the circumstances, a misapplication of the assets, still the question arises as to whether the company, representing in its ownership of land one of these heirs, can object to the distribution of the funds or whether they are estopped, having received (constructively) the benefit of such distribution.

Unless some such estoppel exists it would seem that the company would have a right to insist that the land cannot be held for this claim, but that the remedy of the complainant is against the administratrix and the sureties on account of the waste committed by her, and that, even though the complainant in this case can subject the land to the payment of the claim, the company ought to have its remedy against the administratrix and her sureties for any loss occasioned by the misapplication of the assets of the estate.

The attorneys for Mrs. Johnson, however, say that in the event they have to resort to proceedings in the probate court for the sale of real estate they will select some of the land in which this company is interested out of which to satisfy the whole decree, leaving the Co. to indemnify itself by enforcing contributions from the owners of the real estate.

I suggested to Mr. Weckler that, inasmuch as it appeared that the administratrix had wrongfully distributed 1,280 shares of said stock (part of which I suppose are still within the control of some of them), a quarter of said stock, to wit, 320 shares, might be transferred to

the company, and that the company might thereupon assume and pay a quarter of this decree (the stock being substantially the only assets available at the time of distribution), and he has the matter under consideration.

The value of the stock consists in about 475 feet of land at the extreme easterly end of Chicago avenue, on the north side.

There were 5,000 shares of this stock originally, of which amount 155 shares have been cancelled and retired, leaving 4,845 shares of stock still outstanding.

I cannot learn that they have any other property, and Mr. Weckley says that there are now outstanding liabilities on this land.

Therefore the value of the stock depends entirely on the value of the land. At \$75 per foot the land would make the stock worth \$7 a share, which would fully indemnify the company for the payment of one-quarter of the decree.

Mrs. Johnson's att'ys propose to commence proceedings forthwith in the probate court to subject the real estate to sale unless we come to terms without further delay. I had hoped to be able to send with this a definite answer from Weckler to my proposition relative to the transfer of stock, but have not been able to find him today.

The chief objection I see in allowing them to proceed in the probate court as they proposed is that in the event they succeed in getting a decree for sale of the land they will probably satisfy their whole claim out of the company's land and leave the company to indemnify itself by enforcing contributions against the other
 226 owners, as I have already mentioned; and, further, that any protracted litigation would rest as a cloud on the title pending the suit.

I dislike very much, however, to submit to the payment of any part of this claim without making a rigorous resistance to it, as I think there is an even chance at least of defeating them.

I don't know that I can state the matter any more fully or clearer without being "too long-winded."

Please consider the matter and advise me as early as possible. I have spent a large part of my time for several days in studying this case.

Very respectfully,
 (Signed)

ROBT B. KENDALL, Att'y, &c.

EXHIBIT 51, F. V. C.

CHICAGO, ILL., *January 13th, 1880.*

Union Mut. Life Ins. Co., Boston :

In reply to a letter written by Mr. Nickerson, but without signature, relating to items charged to the Kirchoff property, have to say :

Tax deed (Carbine), \$1,000, is on lot 10, B. 64, original town.; tax deed (Haas), \$153.40, and tax deed (city), \$151.31, cover lots 2 and 4, block 21, C. T. subd'n, in sec. 3, 39, 14; tax deed, \$45, & \$225 costs, covers lot 12, block 4, Knokke and others' subd'n.

The Gage matter of \$2,200 covers all the property, and we have no means of knowing how it should be divided accurately. The vouchers for \$110.42 and \$114.45, 1878 taxes, were sent the company Oct. 30th last.

Vouchers for all other items referred to were given Mr. Kendall long ago for use as evidence in the foreclosure suit. The credit of \$920 may be applied wherever it will do the most good, as it was the proceeds of a note which the company held as collateral and which was collected by Mr. Kendall. We credited it acc't advances, just the same as though Kirchhoff had brought in the money to be applied on acc't.

Yours truly,
(Signed)

E. A. WARFIELD,
G., *Fin'l Ag't.*

227

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 52, F. V. C.

Report.

JANUARY 31ST, 1880.

* * * * *

#682, Kirchhoff.

The claim of Johnson, administratrix, against Diversy, administratrix, to which reference has been frequently made in correspondence to the company, was presented this day to the probate court and allowed by consent of Mrs. Diversy as a claim against the estate of Michael Diversy, and an order was entered pursuant to the recent decision of the supreme court, setting aside the former order of the county court discharging the administratrix.

No proceedings have, however, been commenced as yet to subject the real estate to the payment of this claim. When such proceeding shall be commenced we shall take the best measures we can think of to defend the proceedings. I have come to the conclusion that in this case the Co. ought not to assume any liability until it is forced upon them, and I have great hopes that we will be able to make it exceedingly difficult for them to get authority of court to sell any of the company's real estate.

* * * * *

Respectfully submitted.
(Signed)

ROB'T B. KENDALL.

EXHIBIT 53, F. V. C.

(Copy.)

Loan 682.

CHICAGO, ILL., February 7th, 1880.

Union Mutual Life Ins. Co., Boston:

In reply to pre't's favor of 5th inst. relative to rents due and unpaid.

* * * * *

No. 682, Kirchoff.

This matter has been placed in an attorney's hands for collection, but I hardly think he will succeed. We shall probably have to get an order from court to put him out.

* * * * *

Yours truly,
(Signed)

E. A. WARFIELD,
Financial Agent.
G.

228

EXHIBIT 54, F. V. C.

(Copy.)

Loan 682.

FEBRUARY 25, 1880.

* * * February 3, referred matter of claim of Johnston *vs.* Diversy's est. to Vice-Pres't Sharp, as directed by pres't's last letter.

Decided not to settle any part of claim till it is made certain there is no escape from it. Feb'y 20, recorded quitclaim deed D. G. Hamilton to Co. (tax title). No further proceedings on account of the Johnson claim have been had since our last report.

The att'y for Mrs. Johnson tells me that he proposes to leave the matter of collecting the claim for the present in the hands of the administratrix of Diversy, so that any movement looking to the sale of real estate to satisfy claim will be made by Mrs. Diversy herself, in which case we think we will be able to interpose a successful defense. * * *

Respectfully submitted.

(Signed)

ROBT B KENDALL.

EXHIBIT 54, F. V. C. (Error.)

(Copy.)

Loan 682.

FEBRUARY 25, 1880.

* * * Feb'y 3, referred matter of claim of Johnson *vs.* Diversy's est. to Vice-Pres't Sharp.

[Written across the face:] Error.

EXHIBIT 55, F. V. C.

CHICAGO, ILL., February 28th, 1880.

Union Mutual Life Insurance Company, Boston, Mass.:

Herewith find tax deeds as follows:

No. 682, Kirchoff, John Forsythe to Dan'l Sharp, lots one and 2, bl'k 4, Knocke — Gardner's sub'n, recorded June 5, '79.

No. 682, Daniel Sharp to U. M. L. Ins. Co., same premises as above, not executed; to be executed and returned for record.

682 & 1113, Hamilton to Warfield, E. 3.1 acres of block 3 and all of block 12, Lill & heirs of McGovern, Diversy's * McGovern. div'n; S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ 29, 40, 14; also lots 1, 2, 3, 10, and 11, bl'k 4, Knocke & Gardner's sub'n, &c.; also

lot 3, in bl'k 53, Kenzie's add'n to Chic., said lots being included in trust deed of Kirchoff & al., \$682.00; also, in same deed, lot 8 of sublots 1 to 5 of lots 7 & 8, bl'k 2, & subplot 6 of lots 7 & 8, in bl'k 2, school sec. add'n, being part of the premises described in trust deed of McGovern, No. 1113, never recorded.

229 This deed has been cancelled and deeds given by Hamilton to the Co. direct in place thereof, viz., a deed of the Kirchoff lots was executed in July last, but was not filed for record till 23d inst.

* * * * *

No. 682, city of Chicago to D. G. Hamilton, dated Aug. 1, '79, and recorded Aug. 25, '79, lots 2 & 4, in W. part of block 21, C. T. sub'n of S. frac'l $\frac{1}{4}$ sec. 3, 39, 14. Have prepared deed from Hamilton to the Co., which he is to execute, and it will be sent to the Co. as soon as recorded. Hamilton made a deed of this to Mr. Warfield last August, but, as it has not been recorded, I thought best now to cancel it and let Mr. Hamilton make one direct to the company in place of it.

No. 682, deed from A. Gage to Hamilton, dated July 8, '78, recorded July 10, '78, lot 3, block 53, Kenzie's add'n, &c.; also lots 3, 10, & 11, in bl'k 4, Knocke & Gardner's sub'n, &c.

A deed from Hamilton to company was executed in July last and was filed for record 2, 23, '80, conveying same premises, and will be forwarded as soon as received from recorder's office.

No. 682, deed from H. H. Gage to Hamilton, dated July 6, '78, recorded July 10, '78, conveying bl'ks 3 & 12, in Lill & heirs of Diversy's div'n, and lots 1 & 2, bl'k 4, Knocke & Gardner's sub'n.

A deed from Hamilton to the Co. has been executed, conveying the east 3.1 acres of said bl'k 3 and all of block 12, being all the Co. owns in Lill & Diversy div'n, and lots 1 & 2, in Knocke & Gardner's sub'n, and will be forwarded as soon as recorded.

No. 682, County Clerk Klokke to E. R. Haase, dated M'ch 12, '78; recorded Mar. 14, '78; lots 2 & 4, in W. part bl'k 21, &c.

No. 682, Haase to Warfield, Mar. 12, '78; recorded Mar. 14, '78, same premises.

A deed of same premises was prepared some months ago & delivered to Mr. Warfield for his execution, but it appears upon enquiry that it has not been done.

It will be executed at once and recorded & then sent to the company.

No. 682, deed from Thos. Carbin to Warfield, Nov. 17, '76; recorded November 18, '76; lot 10, bl'k 64, original town.

Warfield deed last above mentioned will also convey to the Co. said lot 10.

No. 682, deed from Hamilton to Sharp, dated June 4, 1879; unrecorded lot 12, in bl'k 4, Knocke & others' sub'n, &c.

The deed herewith enclosed, to be executed by Mr. Sharp, will convey this lot to the company, together with lots 2 & 4, in same sub'n, which are described in deed from Forsythe to Sharp before mentioned. This unrecorded deed should be returned to me for record with the deed of Mr. Sharp.

* * * * *

I have sent you the cancelled deeds in order that they can be, if necessary, compared with your records, &c., after which they better be destroyed, I think.

230 Some of the property described has been sold and conveyed by the company since date of the tax deed.

In such case the deeds are of use to you only as vouchers. Some of them cover property included in several trust deeds and are not very convenient on that account for filing.

Such explanations have been given as I thought would happen in understanding the matters.

If any more tax deeds are missing please advise me. I send these in response to request in the company's recent letter to Mr. Warfield at his request.

He will, I suppose, report if he has any more on hand. Most of the deeds enclosed were filed in my office.

Very respectfully,

(Signed)

ROBT B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 56, F. V. C.

CHICAGO, ILL., March 4th, 1880.

Union Mut. Life Ins. Co., Boston:

Enclosed please find quitclaim deed, D. G. Hamilton to company (tax title), which has been duly recorded.

Yours truly,

(Signed)

ROBT B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 57, F. V. C.

CHICAGO, ILL., March 5th, 1880.

Union Mut. Life Ins. Co., Boston :

The 60c. for recording Q. C. deed from Hamilton to Co. referred to in pres't's favor of 2d inst. applied to lots 2 & 4, block 21, &c., as was plainly written in Mr. Kendall's voucher.

Yours truly,

(Signed)

E. A. WARFIELD,

Financial Agent.

231 Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 58, F. V. C.

CHICAGO, ILL., March 11th, 1880.

Union Mut. Life Ins. Co., Boston :

President's favor of 8th inst. at hand, with papers as stated relative to loans 1655 and 1656, McCoy & Pratt.

The charge of 60c. on No. 682, under date of Feb'y 23, was for recording deed, Hamilton to Co., on E. $3\frac{1}{4}$ acres, block 3, and all of block 12, in Lill & Diversy's sub'n.

Package received by express contained five policies expiring in April, as listed in president's favor of 9th inst.

Yours truly,

(Signed)

E. A. WARFIELD.

Financial Agent.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 59, F. V. C.

CHICAGO, ILL., March 18, 1880.

Union Mutual Life Ins. Co., Boston :

Enclosed please find quitclaim from David G. Hamilton to company (tax title) of lots 2 & 4, in W. part of bl'k 21, in C. T. sub., &c., being a portion of former security to loan No. 682, Kirchoff.

Yours respectfully,

(Signed)

ROBT B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 60, F. V. C.

(Copy.)

Loan 682.

MARCH 31, 1880.

* * * March 4, sent to Co. quitclaim deed, Hamilton to Co. (tax title). Received from Co. quitclaim, Hamilton to Sharp, 232 and recorded same. Mar. 15, proof of service of order on Ruanyan and on person in possession, and default and decree *pro confesso* as to Runyan, Stanford & Jenkins, and ref. to mast. Mar. 25, notice of hearing before master for 26th. Mar. 26, attended before master on him; no app. by defts; instructed to await return of Dr. Boone as a witness.

I found it was necessary in this case to get a decree of court in order to cut off the rights of certain parties under a sheriff's deed covering homestead lot, and also concluded that it would be better, as my pet. prays for a correction of certain errors of description of the farm, to have a decree entered correcting the same; otherwise the record of the court would show that part was abandoned.

Our quitclaim deeds from Mrs. Diversy contain the proper descriptions, but as the proceedings had gone so far in the court, it seems better to have the correction made by the decree. I had fixed upon a day for taking testimony of Dr. Boone in the matter as to the intention of the parties in making the trust deed, but he was suddenly called away just at that time, and I shall now have to wait his return.

Respectfully submitted.

(Signed)

ROBT B. KENDALL

EXHIBIT 61, F. V. C.

CHICAGO, ILL., April 10th, 1880.

Union Mut. Life Ins. Co., Boston:

Enclosed please find quitclaim deed from J. Edw. Everett to Albert Curtis conveying premises recently purchased by the Co.; also a quitclaim deed from Daniel Sharp to company (tax title), loan 682, Kirchhoff.

Yours respectfully,

(Signed)

ROBT B. KENDALL

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 62, F. V. C.

CHICAGO, ILL., April 14, 1880.

Union Mutual Life Ins. Co., Boston:

Mrs. Diversy desires to settle tax claim on the part of the farm released to her out of trust deed No. 682, Kirchoff, the company holding certificate of sale on same.

Please therefore forward the tax certificate and receipts, if any, upon that part of the land described in trust deed, situate in township 42.

Yours re'p'y,
(Signed)

ROB. B. KENDALL.

233

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 63, F. V. C.

CHICAGO, ILL., April 23d, 1880.

Union Mut. Life Ins. Co., Boston:

Herewith please find the following fire policies:

*	*	*	*	*	*	*
682, Kirchoff;	28653, Continental,	\$2,000;	expires	April 1, '81.		
682, Kirchoff;	15790, Merchants,	\$1,500;	expires	April 1st, '81.		
682, "	57137, Newark,	\$1,500;	expires	Apr. 1, '81.		
*	*	*	*	*	*	*

Yours respectfully,
(Signed)

E. A. WARFIELD, *Fin'l Ag't.*

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 64, F. V. C.

CHICAGO, ILL., April 24, 1880.

Union Mut. Life Ins. Co., Boston:

The charge of \$5.12 referred to in vice-pres't's favor of 20th inst. does not belong to any "particular portion" of the Kirchhoff property, but to all.

Yours truly,
(Signed)

E. A. WARFIELD,
Financial Ag't.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 65, F. V. C.

(Copy.)

Loan 682.

APRIL 30, 1880.

* * * April 10, sent to Co. one quitclaim deed, Sharp to Co. (tax title), lots 1, 2, and 12, B. 4, Knokke and Gardner's sub'n.
234 April 14, wrote the Co. to forward certain tax vouchers pertaining to the Diversy farm in order to effect a settlement with Mrs. Diversy relative to her redemption of the tax claims held by the Co. of the portion of the land released to her; received tax certificates and receipts enclosed in vice-pres't's letter of the 17th of April; have computed the amount which Mrs. Diversy has to pay, and have notified her through Mr. Weckler and requested him to call and settle. This he has not yet done, although I sent for the papers at his request. * * *

Respectfully submitted.

(Signed)

ROBT B. KENDALL, *Att'y.*

EXHIBIT 66, F. V. C.

CHICAGO, ILL., May 8, 1880.

Union Mutual Life Ins. Co., Boston:

Enclosed please find quitclaim deed (tax title) from D. G. Hamilton & wf. to Daniel Sharp (vice-pres't) of property security to loan 682, Kirchhoff, duly recorded.

Yours respectfully,
(Signed)

ROBT B. KENDALL.

P. S.—Deed from Sharp to Co. has been already sent forward.
(Signed) KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 67, F. V. C.

CHICAGO, ILL., May 28, 1880.

Union Mut. Life Ins. Co., Boston:

In reply to president's favor of 7th inst. relative to 682, Kirchoff, will report that about the time the president was here last I gave the case to Mr. Wheeler and he succeeded in getting \$100 out of Kirchoff. Since then the "Best Brewing Co." have closed up Kirchoff's business and he is out of funds and likely to remain so.

I have written to Messrs. Kendall & Bliss to get an order from the court to either pay the rent or vacate the premises.

Yours truly,
(Signed)

E. A. WARFIELD.

235

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 68, F. V. C.

(Copy.)

Loan 682.

MAY 31, 1880.

* * * May 8th, sent to Co. 1 quitclaim deed (tax title) from D. G. Hamilton to Daniel Sharp (V. P.), lot 12, B. 14.

May 28th, received letter from Mr. Warfield as receiver saying he was unable to collect am'ts now due from premises occupied by Kirchoff and requesting that measures be taken to eject him. I shall make application to the court for assistance in this matter as soon as the national convention is over, the court having adjourned during the meantime.

* * * * *

Respectfully submitted.
(Signed)

ROBT B. KENDALL, Att'y.

EXHIBIT 69, F. V. C.

CHICAGO, ILL., June 7th, 1880.

Union Mut. Life Ins. Co., Boston :

Referring to the matter of rent due from Mr. Kirchoff for house on Rush St., have to say he has today paid me \$80.00 and promises to pay \$60 per month, commencing the 20th inst., until the acc't is squarred. I have not much faith in his promises, and had it been earlier in the season would not have accepted the money, but under the circumstances thought best to get the \$80.00 and if the \$60.00 is not forthcoming on the 20th will immediately proceed to get possession.

Yours truly,
(Signed)

E. A. WARFIELD,
Financial Ag't.

236

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 70, F. V. C.

CHICAGO, ILL., June 7th, 1880.

Union Mut. Life Ins. Co., Boston :

Please send with description of the 90 acres in section 28, town. 42, and range 13, contained in the deed from Mrs. Diversy to the Union Mutual Life Ins. Co. which grew out of the settlement with Mrs. Diversy in connection with the Kirchoff matter, loan No. 682. This deed was sent to the home office by Mr. Kendall, Oct. 22, '79.

Yours truly,
(Signed)

E. A. WARFIELD, *Fin'l Ag't.*

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 71, F. V. C.

(Copy.)

Loan 682.

JUNE 30TH, 1880.

* * * Testimony of Dr. Boone in regard to the misdescription in trust deed, showing what property was intended to have been described, has been taken by the master in chancery, and his report has been made up.

Report finds that the description was incorrect by clerical mistake, and also finds what the correct description is.

On the strength of which report we shall get a decree reforming the description in the trust deed so that there can be no question hereafter as to its correctness.

Respectfully submitted.

(Signed)

ROBT B. KENDALL, *Att'y.*

EXHIBIT 72, F. V. C.

CHICAGO, ILL., *July 10th*, 1880.

Union Mut. Life Ins. Co., Boston :

I beg to enclose herewith 2 certificates and 1 receipt on the Diversy farm, being a portion of security to former loan No. 682, Kirchhoff. Said certfs. and receipt were sent to me on April 17th, last, in a favor from vice-pres't.

237 I find upon examination that they do not cover the property released to Diversy.

Yours truly,

(Signed)

ROBT B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 73, F. V. C.

CHICAGO, ILL., *July 12*, 1880.

Union Mut. Life Ins. Co., Boston :

President's favor of the 9th relative to Kirchhoff matter, No. 682, is at hand. I have instructed Mr. Kendall to proceed in this case and get Mr. Kirchhoff out.

As soon as he does so I will rent the premises to somebody who will pay more promptly.

Yours truly,

(Signed)

E. A. WARFIELD, *Fin'l Ag't.*
W.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 74, F. V. C.

CHICAGO, ILL., July 24, 1880.

Union Mut. Life Ins. Co., Boston :

Referring to president's favor of 9th ult. concerning taxes, have to report that the taxes on

* * * * *

No. 682, Kirchoff. It has been a little difficult for me to get the description of the land near Wilmette in such shape that I could pay the taxes. According to our records somebody has paid the taxes on all this property except 15 acres. We are having the matter looked up, and will report to you again concerning —. A portion of the taxes were paid by the receiver. * * *

Yours truly,

(Signed)

E. A. WARFIELD, *Fin'l Ag't.*
W.

238

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 75, F. V. C.

CHICAGO, ILL., Aug. 5th, 1880.

Union Mut. Life Ins. Co., Boston :

The following list of special assessments can be paid without any additional costs any time during the next 60 days, if found to be advisable to pay them on investigation. * * * No. 682, Kirchoff, \$108, for curbing, grading, & paving Fulton street.

* * * * *

Yours truly,

(Signed)

E. A. WARFIELD, *Fin'l Ag't.*
W.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 76, F. V. C.

CHICAGO, ILL., August 5th, 1880.

Union Mut. Life Ins. Co., Boston:

The following is a list of unpaid taxes on the company's property in this county, so far as I am able to learn:

* * * * *

682, Kirchoff. Taxes appear to be all paid except on 15 acres of the Diversy farm, and probably some one has paid taxes on this farm by mistake.

The taxes on lot 26 of bl'k 28, in Rose's subd'n, W. $\frac{1}{2}$ sec. 5, 39, 14, have been paid by Gage for some years. I think Mr. Hamilton understands that the Co. has no title to this lot. It is my impression that the title is good in the Co., subject to Gage's tax deed, but I may be in error.

* * * * *

In all the above cases there are reasons for not paying these taxes which have already been submitted to the company.

Yours respectfully,

(Signed)

E. A. WARFIELD, *Fin'l Ag't.*
W.

239

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 77, F. V. C.

(Copy.)

Union Mutual Life Insurance Company, [No. 133 La Salle street.*]

[E. A. Warfield,*] financial agent; R. B. Kendall, attorney.

CHICAGO, ILL., Sept. 24th, 1880.

Union Mut. Life Ins. Co., Boston:

In am in receipt of pres't's favor of 15th inst. with c'k, \$621.81, to the order of Johnson. Collector and enclosed herewith tax receipt in duplicate on properties # 1113, # 480, # 715, # 1170, # 902,

1332, # 682, # 1565, and # 2267—amounting to \$613.87, which, with \$9.94, returned to me by collector for spec. ass't annulled on # 601 property and which appears in my daily statement, makes \$621.81, the amount of Co.'s check. In case of # 2092 the proper amount was paid and receipt in duplicate sent with my last week's report. I gave the notice in # 1164, Woodman case, to Mr. Morey, who said he would get the purchaser to pay it, if possible.

Yours truly,

(Signed)

J. H. GALLERY.

EXHIBIT 78, F. V. C.

Union Mutual Life Insurance Company, [No. 133 La Salle street.*]

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; [E. A. Warfield, financial agent; *] R. B. Kendall, att'y.

71 WASHINGTON STREET, CHICAGO, ILL., Oct. 22, 1880.

Union Mutual Life Insurance Company, Boston :

In reply to letter of the 19th relative to tax title of Gage on lot 26, O. J. Rose's sub'n (loan 682, Kirchoff), and to copy of Warfield's letter of Aug. 5, '80, sent me a short time ago.

Upon receipt of your former letter enclosing copy of Warfield I requested Mr. Hamilton to open negotiations with Gage relative to settlement of his claims, all such negotiations having been made through him heretofore. I suppose he could manage Gage better

than I could, and, besides, he had an understanding with
240 Gage at the time the Co. had a general settlement with him that he had included all claims on land the Co. were interested in & it was unfair in Gage to keep this back—so Hamilton says. Hamilton has not yet reported progress; will enquire of him.

Very truly,

(Signed)

ROBT B. KENDALL.

EXHIBIT 79, F. V. C.

Real-estate office of Henry C. Morey, 79 Dearborn street.

CHICAGO, Oct. 26, 1880.

Union Mutual Life Ins. Co. :

I had an offer this morning of \$5,000 cash for No. 155 Fulton St., part of the Kirchoff loan. This property, I believe, was valued at \$5,000, but I have been asking \$6,000 for it in the hope of getting near that am't. I find, however, that the building is in such bad repair that most parties do not attach much value to it, & the ground without the building is worth about \$125 per foot, or \$3,750.

So that I am now of the opinion that we shall not be able to get much, if any, over \$5,000 for it.

Since making the offer this morning the party who wishes to keep a lodging-house in it, if he buys, has been over & inspected it more thoroughly & wants to wait a day or two before renewing his offer. I write to see if in case I cannot do better if I shall take \$5,000 for it. I understand from Mr. Kendall that the title can be made to this property all right.

* * * * *
Yours resp'y,
(Signed)

H. C. MOREY.

EXHIBIT 80, F. V. C.

Union Mutual Life Insurance Company, 71 Washington [No. 133
La Salle street.*]

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield [financial agent; *] R. B. Kendall, attorney.

EXHIBIT 80 CONTINUED.

71 WASHINGTON ST., CHICAGO, ILL., Oct. 27th, 1880.

Union Mutual Life Insurance Company, Boston, Mass.:

On the 23d Sept. last I was informed by Mr. Kirchoff that a special agent of the U. S. Treasury had been to see him with reference to a claim of the United States upon a part of lots 2 & 4, bl'k 21, C. T. sub'n of S. fractional of sec. 3, 39, 14, being the Pine 241 St. block & the lot on the corner of Rush & Pearson Sts., resulting from a seizure of the distillery formerly occupying the ground.

It appears that Kirchoff was, some time prior to the great fire, carrying on the business of a distiller upon the premises, and that a seizure was made by the collector of internal revenue for some violation of the revenue laws, and that after the usual legal proceedings in court the property was sold and bid in by the Government for \$2,500. This M'ch 31, '71.

The fire destroyed all the records of the county, as you know, and this sale seems never to have been noted by the abstract-makers. In fact the deed to the U. S. was never recorded. Hence there is nothing to put any one on enquiry in regard to the matter, and if it was a transaction between individuals the adverse title could not be maintained, but with the Government it is different.

The statutes of limitations do not bar the United States from setting up any claim, as I understand the law. This matter has slumbered all these years without anything having been done since the sale in M'ch, 1871.

I had an interview with the agent of the Treas'y Dep't when he was here and got from him the facts before stated. He wants an offer for the Gov't title.

Since then I have had a letter from him from Washington, to which I have replied, saying I have not yet got a proposition from the Co., but would try an advisement very soon what you would do about it, and ask him that matters remain *in statu quo* for a while.

The property has been sold (23d inst.) by the master in ch'y and bid in by the Co. I enclose rough sketch showing location of the Gov't claim, by which you will see that the land claimed by the Gov't takes part of lots 1, 2, 3, & 4.

(Here follows diagram marked p. 484.)

The owner of lot 1 is very anxious to buy from the Co. the W. 30 ft. of lot 2, and says he will give \$100 a foot for lot 4.

The Treasury agent told me he had not mentioned the matter to any of the occupants of the land except Kirchoff, as he considered him principally interested.

I bid in lot 2 for \$9,000 and lot 4 for \$8,000, so that a purchaser would not be afraid of redemption.

This is an additional complication of the Kirchoff case, but may not be very serious. I was given to understand by the Treas'y ag't that the Gov't did not expect a large bid, but was disposed to take anything reasonable.

The Gov't would, however, have to sell at auction and will advertise if a reasonable bid is filed in advance.

Probably there would be no competition.

If I have not made this matter clear it is because of the difficulty of explaining by letter, not because the letter is too short.

Yours truly,
(Signed)

ROBT B. KENDALL.

71 WASHINGTON, CHICAGO, ILL., Oct. 30, 1880.

Union Mutual Life Insurance Company, Boston:

I gave a draft to Henry W. Bishop, master in chancery, yesterday for the sum of nine hundred and seven $\frac{7}{10}$ dollars for costs, commissions, &c., in case *vs. Kirchoff*.

Will forward certificates of sale with statement on Monday next.

The bids amounted to \$92,000, and I settled with the master's commission on basis of \$50,000, $1\frac{1}{2}$ %, \$750.

Yours truly,
(Signed)

ROBT B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, 71 Washington [No. 133
La Salle *] street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter,
secretary; [E. A. Warfield, financial agent; *] R. B. Kendall, at-
torney.

EXHIBIT 82, F. V. C.

71 WASHINGTON, CHICAGO, ILL., Nov. 2d, 1880.

Union Mutual Life Insurance Company, Boston:

I submit the following statement of the Kirchhoff case in matter
of the sale under decree of foreclosure:

Decree entered Aug. 30, '80, for.....	\$91,358 16
Int. on am't in decree to day of sale....	761 31
Taxed costs.....	119 27
Master's commissions (1½ % on \$50,000).....	750 00
Master's certificates of sale (15).....	7 50
“ p'd recording duplicate certifs	10 50
“ “ advertising sale.....	15 50
“ report of sale.....	5 00
Total	<u>\$93,027 24</u>
Am't bid at sale.....	92,000 00
Deficiency.....	<u>\$1,027 24</u>

Herewith find certificates of sale as follows:

1. Lot one (1), bl'k 4, Knokke & Gardner's sub....	\$1,500 00
2. “ two (2), “ 4, “ “ “	1,500 00
3. “ three (3), “ 4, “ “ “	1,500 00
4. “ ten (10), “ 4, “ “ “	2,500 00
5. “ eleven (11), “ 4, “ “ “	2,500 00
6. “ twelve (12), “ 4, “ “ “	2,500 00
7. Lot ten (10), 64, original town of Chicago.....	8,000 00
8. “ twenty-six (26), O. J. Rose's sub'n, &c.....	1,000 00
9. “ three (3), in N. E. cor. bl'k 53, Kinzie's add'n.	3,000 00
✓ 10. “ two (2), bl'k 21, C. T. sub'n S. frac. 3, 39, 14...	9,000 00
✓ 11. “ four (4), bl'k 21, “ “ “ “ “	8,000 00
12. E. 3 ¹ / ₉ acres of bl'k 3, in Lill & heirs of Diversy's div'n of S. W. ½ N. W. ¼ sec. 29. 40, 14.....	9,000 00
13. Block twelve (12), in last above division.....	15,000 00
14. N. 15 acres of N. E. ¼ of S. E. ¼ sec. 28, 42, 13, ex- cept R. R.....	4,500 00
15. E. ½ N. E. ¼ sec. 28, 42, 13, except railroad.....	22,500 00
	<u>\$92,000 00</u>

[* Words enclosed in brackets erased in copy.]

The holders of these certificates will be entitled to deeds on 21st January, 1882.

It seemed to be best to bid in these pieces of property for about enough to satisfy the decree and costs, partly because a deficiency decree would be worthless, and it was also understood between the parties to the suit, Kirchoff & wife & Mrs. Diversy, that in consideration of their quitclaim deeds no deficiency decree should be taken, and partly because it might enable the company to sell the property before the master's deed will be issued in January, 1882, holding as you now do the deed of Kirchoff & wife and certificates of sale for, probably in most cases, much more than the market value of the property, so that a purchaser, being the assignee of the certificate for a sum much less than its face, would have no fear of its redemption by any creditor.

It seems now that the property might be all put into the market.

This policy in regard to the bids has, of course, added a few hundred dollars to the expense of foreclosure, perhaps \$200, but on such a large amount of property that will not weigh against the advantage to be derived from holding it at high figures.

The master agreed to base his commission on \$50,000 and allow me to bid as high as desired.

The claim presented about a year ago growing out of the old suit of Johnson *vs.* Diversy, about which some correspondence has been had between the Co. and myself, has recently revived enough to again threaten proceedings to subject his land to it—payment in part, and we may have to defend against it yet, although I had concluded the claimant had abandoned any hope of mulching the company.

They have engaged fresh legal talent & have interviewed your humble servant two or three times and have requested a decision as to what we will do. We have taken time to consider. They seem to wait very patiently.

We keep them waiting—pleasantly.

Your counsel flatters himself that he is good at that—his “stronghold,” as it were—and he has no doubt you will cherefull- accord him much credit in that line.

244 Hoping for your approval of the course pursued, and hoping Garfield will be elected today, I remain,

Yours truly,
(Signed)

ROBT B. KENDALL.

ELIZABETH KIRCHOFF.

251

(Letter-head of original.)

Union Mutual Life Insurance Company, 71 Washington [No. 133
La Salle*] street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter,
secretary; [E. E. Warfield, financial agent; *] R. B. Kendall,
attorney.

EXHIBIT 83, F. V. C.

(Copy of telegram.)

CHICAGO, Nov. 8, 1880.

Union Mutual Life Ins. Co., Boston :

* * * * *

Think can make Kirchoff, Fulton St., move than five soon.

(Signed)

H. C. MOREY.

EXHIBIT 84, F. V. C.

Real-estate office of Henry C. Morey, 79 Dearborn street.

CHICAGO, Nov. 8, 1880.

Union Mutual Life Ins. Co.:

* * * * *

There is considerable enquiry for manufacturing property & I
will make price of Kirchoff, 155 Fulton St., at \$6,000, & I think I
may be able to get at least \$5,500 and perhaps \$6,000 for it.

Y'rs resp'y,

(Signed)

H. C. MOREY.

EXHIBIT 85, F. V. C.

CHICAGO, ILL., Nov. 10, 1880.

Union Mutual Life Insurance Co.:

In reply to favor of 2nd relative to the Kirchoff case and the
claim of the United States, saying that you cannot find that, I state
for what am't claim can be settled, &c. I have to say that the
Treasury ag't whom I saw did not name any sum, but intimated
that a bid for something less than the am't the Gov't bid the prop-
erty in for, viz., 2,500, would be acceptable.

From recent conversation with the ass't U. S. dist. att'y here, to
whom the sp'l ag't referred me, I learn that the ag't had the sum
of \$2,000 in his mind.

245 I think there are circumstances connected with the case
that may influence more favorable terms.

The difficulty is the only records of the Gov't claim are in Wash-
ington, and consequently I cannot thoroughly investigate without
going there.

Yours truly,

(Signed)

ROBT B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, 71 Washington [No. 133
La Salle*] street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter,
secretary; [E. A. Warfield, financial agent; *] R. B. Kendall, at-
torney.

EXHIBIT 86, F. V. C.

Real-estate office of Henry C. Morey, 79 Dearborn street.

CHICAGO, Nov. 10, 1880.

Union Mutual Life Ins. Co.:

I enclose a list of the company's property with valuations accord-
ing to my record.

* * * * *

Had an offer of \$5,000 for 155 Fulton St. today, Kirchoff. The
inside of the building is in a deplorable condition—back walls
cracked—and the proposed purchaser estimated he would have to
spend \$1,500 to put it in good shape.

Y'rs resp'y,
(Signed)

H. C. MOREY.

EXHIBIT 87, F. V. C.

CHICAGO, ILL., Nov. 13th, 1880.

Union Mut. Life Ins. Co., Boston:

As per request in yours of the 11th inst., please find enclosed a
receipted bill for costs, commission, etc., in case *vs.* Kirchoff, amount-
ing to \$907.77, for which sum I drew on you the 29th ult. (or ab't
then).

Yours truly,
(Signed)

ROBT B. KENDALL.

[* Words and figures enclosed in brackets erased in copy.]

ELIZABETH KIRCHOFF.

246

(Letter-head of original.)

Union Mutual Life Insurance Company, No. [133 La Salle*] 71
Washington street.

John E. De Witt, pres.; Daniel Sharp, vice-pres; J. P. Carpenter,
secretary; [E. A. Warfield, financial agent; *] R. B. Kendall, at-
torney.

EXHIBIT 88, F. V. C.

Real-estate office of Henry C. Morey, 79 Dearborn street.

CHICAGO, Dec. 1, 1880.

Union Mutual Life Ins. Co.:

I am offered \$5,500 for 155 Fulton St., Kirchoff loan, payable as
follows: \$500 cash, 500 6 mos., 4,500 12 mos., int. 6 % per annum,
& taxes 1880.

This is \$500 better than I had been expecting lately to get offered,
as the inside of the building has been torned out and damaged.
The party who wished to buy intends to spend several hundred
dollars in repairs at once. Chalwin & Frazer, the machinist, who
own east of this property, offered me \$4,500 for it, but would not go
higher; another party, \$5,000 and no taxes of 1880; so that, if
these terms suit, I think it is a good sale. Purchaser of 1911 Wa-
bash is a lone laundry woman and I am afraid is not going to stick
to her offer.

Yours resp'y,
(Signed)

H. C. MOREY.

EXHIBIT 89, F. V. C.

CHICAGO, ILL., Dec. 7, 1880.

Union Mutual Life Insurance Company, Boston, Mass.:

Your letter of the 3d, with three quitclaim deeds, viz., 643, No.
682, No. 682, is at hand.

We have prepared three quitclaim deeds from Warfield and wife
to the company and requested him to execute the same.

As soon as he has done so they will be recorded and forwarded
to the company.

Very respectfully,
(Signed)

KENDALL & BLISS.

[* Words and figures enclosed in brackets erased in copy.]

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; [E. A. Warfield,*] financial agent; R. B. Kendall, attorney.

EXHIBIT 90, F. V. C.

CHICAGO, Dec. 7, 1880.

Union Mutual Life Insurance Company, Boston, Mass.:

Your letter of Dec. 3d, saying that sale of Kirchoff property on Fulton St. is approved, was duly rec'd.

The abstract is now being continued, and as to the matter of assigning the certificate Mr. Morey has been already advised.

Very respectfully,

(Signed)

KENDALL & BLISS.

(Letter-head of original.)

Union Mutual Life Insurance Company, [No. 133 La Salle street.*]

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; [E. A. Warfield,*] financial agent; R. B. Kendall, attorney.

EXHIBIT 91, F. V. C.

Real-estate office of Henry C. Morey, 79 Dearborn street.

CHICAGO, Dec. 9, 1880.

Union Mutual Life Ins. Co.:

Referring to my last letter, in regard to sale of 155 Fulton St., I have to refer to that C. L. Jenks, the father of the party who made the offer of \$5,500 and who "sat down" on his son's proposed purchase as being one he could not carry out, now comes to the front and makes the following proposition, which he says will be carried out, viz:

He agrees to pay for the property \$5,000.

Cash	1,000
3 years int., 7 per cent. per annum, payable s.-annually. . . .	4,000
	<hr/> 5,000

and taxes, 1880.

I was in hopes to get you 5,500 for this property, but find it a tough job, and expect the above offer is about as good as we can expect at present.

Y'rs resp'y,

(Signed)

H. C. MOREY.

Please telegraph answer.

[* Words enclosed in brackets erased in copy.]

ELIZABETH KIRCHOFF.

248

EXHIBIT 92, F. V. C.

(Copy of telegram.)

CHICAGO, ILL., Dec. 14, 1880.

Union Mutual Life Ins. Co., Boston:

Purchaser offers fifty-five hundred for one fifty-five Fulton; five cash, five six months, forty-five three years, six interest.

(Signed)

H. C. MOREY.

EXHIBIT 93, F. V. C.

Real-estate office of Henry C. Morey, 79 Dearborn street.

CHICAGO, Dec. 15, 1880.

Union Mutual Life Ins. Co.:

Your telegram of 15th inst. approving sale of 155 Fulton St., 5,500, duly rec'd, and the party takes the property and will be ready to close as soon as abstract is ready and title examined and found right.

* * * * *

Yours resp'y,
(Signed)

H. C. MOREY.

Mr. Prentice, who owns the brick house adjoining on Pine St., offers \$6,000 cash for corner of Rush and Pearson.

Thinks, as he has no use of property for a year, that is enough, but I think it will bring more.

EXHIBIT 94, F. V. C.

CHICAGO, ILL., 1, 5, 1881.

Union Mutual Life Ins. Co., Boston:

We enclose copy of your letter to Mr. Morey sent us with your favor of the 15th ult'o relative to sales of Wethnel, Rick, and Kirchoff property-s.

We find it nearly illegible and therefore don't like to rely upon it for instructions.

The "copy of telegram" mentioned in same favor was not enclosed, as you supposed.

We can, of course, have access to Morey's letter; but if you send us any more copies, please send legible ones.

Yours truly,
(Signed)

KENDALL & BLISS.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

EXHIBIT 95, F. V. C.

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

CHICAGO, ILL., 1, 20, 1881.

Union Mutual Life Insurance Company, Boston :

Lot 10, block 64, original town of Chicago, known as the Fulton St. property, Kirchoff loan #682, appears to have been sold for city taxes of 1874 (releived) to Wm. Mills, Sept. 20, '78, for \$79.52.

Mills is one of Hamilton's clerks, and we therefore assume that the certificate of sale is in your possession.

The same lot was also sold for the State, county, and city taxes of 1877 to D. G. Hamilton, Oct. 14, '78, for 122.90, and you probably hold the certificate of sale in this case.

As this lot has been sold, it will be necessary to have the certificate surrendered and cancelled in order to satisfy the purchaser.

Please, therefore, send them to us for that purpose.

Yours truly,

(Signed)

KENDALL & BLISS, Att'ys.

EXHIBIT 96, F. V. C.

Kendall & Bliss, attorneys.

JAN'Y 31, '81.

Union Mutual Life Ins. Co., Boston :

Herewith find my check for the sum of one hundred and fifteen dollars and seventy-eight cents (\$115.78), being am't collected from Mrs. Diversy for tax claim on the 40 acres released to her from the Kirchoff-Diversy trust deed (No. 682), which claim she agreed to take up before, but was unable to at time the release was given, but which she was obliged to take up because the Co. hold tax certificate, viz :

Tax-sale certificate.....	\$47 52
Interest on same, 3 years 4 mos., 6 %.....	9 50
Am't p'd for subsequent tax.....	51 28
Int. on same, 2 yrs. 3 mos., 6 %.....	6 91
Costs.....	57
Total.....	\$115 78

250 The rate of int. was agreed upon at time the compromise was made.

Not having access to your deposit book, I remit in this manner. Please acknowledge receipt.

The tax-sale certificate was surrendered to Mrs. Diversy, but you have the receipt for the subsequent tax, which will show the items of \$51.28 and the 57c. costs, although they are probably "lumped" with other charges on your books.

Hoping this my last collection I shall report for the Co. will be satisfactory,

I am, very resp'y,
(Signed)

ROBT B. KENDALL.

EXHIBIT 97, F. V. C.

D. G. Hamilton & Co., tax-abstract makers & investors in taxes, 126
South Clark street.

CHICAGO, ILL., Feb'y 2, 1881.

Daniel Sharp, Esq., vice-pres., Boston, Mass.

DEAR SIR: In reply to yours of 26th January and enclosed copy of report of your att'y relative to No. 682, Kirchhoff, I would say that after receipt of the letter of Oct. 22nd I saw and talked with the attorney relative to that matter.

I also knew that this lot was claimed to be in the Kirchhoff trust deed, but somehow I have always understood that that Kirchhoff did not own that lot, as well as some lots in Knokke & Gardner's subdivision. Upon what I based this understanding I do not now recall.

I do not know how this was not settled for with Gage three years ago. I gave him my list, and he prepared his list of claims from it. I also checked off his books with him from my list; but, however the case may be, he has not bought the property at tax sale since I have had the company's list, Gage having regularly paid all taxes as they accrued since 1875. He purchased at tax sale of 1872, 1873, and 1875, and has paid all the taxes since, including taxes of 1880.

I enclose his two letters relating to the lot received yesterday, wherein he sets his price at \$290. I cannot at this moment pass upon the price, nor do I know that you want me to. I will, however, look into it and be ready to report after I hear from you.

The remainder of the report I know nothing about, having never heard of it before, and assume that it was sent to me by mistake.

Yours truly,
(Signed)

D. G. HAMILTON.

251

EXHIBIT 98, F. V. C.

CHICAGO, ILL., February 5, 1881.

Union Mut. Life Ins. Co., Boston :

Enclosed find for execution deed from Co. to Peter Rhode for lot 10, blk 64, formerly loan # 682, Kirchoff.

As the Co. have not a deed to this property, it will be necessary to send the certificate here for assignment.

Under date of Dec. 3d the president writes that the sale of this property is approved—\$500 cash ; \$500, 6 mos. ; \$4,500, 12 mos., int. 6 %, and tax of 1880.

In a letter dated Dec. 15, to H. C. Morey, the terms are stated as above, except as to the last payment, which is \$4,500 ; 3 years.

Please inform me which way to make the papers.

Very respectfully,

(Signed)

E. R. BLISS.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres. ; Daniel Sharp, vice-pres. ; J. P. Carpenter, secretary ; [E. A. Warfield,*] financial agent ; [R. B. Kendall,*] attorney.

EXHIBIT 99, F. V. C.

D. G. Hamilton & Co., tax-abstract makers, &c., 126 South Clark street.

CHICAGO, ILL., Feb. 11, 1881.

Daniel Sharp, Esq., vice-pres't U. M. L. Ins. Co., Boston.

DEAR SIR : No. 682, in accordance with your instructions of Feb. 5, '81, I negotiated with Mr. Gage for lot 26, in E. $\frac{1}{2}$ block 28, section 5, 39, 14, and paid him today \$250 ; therefore I enclose his receipt therefor and all the tax vouchers. As I did not know to whom to take the deed, I took it to myself till I received instructions from the home office.

The deed from As-hel Gage I did not receive, but will by Wednesday next.

* * * * *

Recapitulation.

* * * * *

No. 682, tax claim from Gage, \$250.00.

[Total paid out by me without commissions, \$540.04. C. L. D.*]

I send herewith the vouchers I have receipt from Gage, including tax receipts, but retain the deed till I get the other from
252 Asahel Gage and receive instructions to whom to make my quitclaim, if it is desired.

* * * * *

Yours truly,

(Signed)

D. G. HAMILTON.

EXHIBIT 100, F. V. C.

(Copy of telegram.)

CHICAGO, Feb. 12, 1881.

Jno. E. De Witt, 153 Tremont, Boston :

Kirchoff case, Morey's agreement, accepted by company, says :
Cash, five hundred ; six months, five hundred. This brings six-
months' note due June fifteenth. Shall we make same to close to-
day ?

(Signed)

JOHN O. WINSHIP.

EXHIBIT 101, F. V. C.

John O. Winship, [Kendall & Bliss*] attorney, 71 Washington street,
Chicago.

FEB'Y 14, 1881.

Union Mutual Life Ins. Co.

GENTLEMEN : I telegraphed you on Saturday in relation to the
Kirchoff case. This seems to be the situation : Morey says he for-
warded to you a proposition for sale of this property at a certain
price, with cash, \$500, and five hundred dollars in six months.
This was Dec. last, and would bring the note due next June. Now,
Morey says you accepted this offer, and the party is ready to close
the matter and was on Saturday last on these terms, but Bliss says
your instructions are positive to have all notes due and payable
May 1st, &c. I telegraphed you in order to settle this, and if you
have such a rule would it not be best to so notify Morey in regard
to receiving propositions for sale ? And, again, would it not be
well to have Morey make his proposition of sale to you through
this office, that in the first place, we might know just what the offer
is and our records show the whole transaction, and, secondly, that
we might be in possession of useful information, which we could
communicate to you, which would aid you in determining the ac-
ceptance or rejection of the offer.

I submit this suggestion.

Very truly,

(Signed)

JOHN O. WINSHIP.

253

EXHIBIT 102, F. V. C.

CHICAGO, ILL., Feb'y 21, 1881.

Union Mutual Life Ins. Co., Boston :

Sale of Kirchoff, No. 682 (lot 10, B. 64, O. T.), closed ; have de-
posited \$500, and herewith enclose note.

The mortgage is at the recorder's office.

Respectfully,

(Signed)

E. R. BLISS.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; [E. A. Warfield,*] financial agent; [R. E. Kendall,*] attorney.

EXHIBIT 103, F. V. C.

Real-estate office of Henry C. Morey, 79 Dearborn street.

CHICAGO, Feb'y 24, 1881.

Union Mutual Life Ins. Co. :

I have this day rec'd per d'ft from J. E. De Witt, pres., on your payment for the following bills, coms. on sale :

*	*	*	*	*	*	*	*
Kirchoff, 155 Fulton.....	137 50
							[\$225 00*]

Yours resp'y,
(Signed)

H. C. MOREY.

EXHIBIT 104, F. V. C.

CHICAGO, ILL., 2, 22, '81 (called).

Union Mut. Life Ins. Co., Boston :

In reply to your letter to Mr. J. O. Winship of the 16th inst., handed by him to me, I would say that the following papers have been sent by express :

*	*	*	*	*	*	*	*
---	---	---	---	---	---	---	---

In the following the papers asked for have become a part of the files in the U. S. court and cannot be withdrawn unless for a special purpose:

682, Kirchoff, 2 T. D.'s.

*	*	*	*	*	*	*	*
---	---	---	---	---	---	---	---

254 The following deeds have been delivered and sales closed :

*	*	*	*	*	*	*	*
---	---	---	---	---	---	---	---

682, Kirchoff note sent H. O. mtg. at recorder's.

*	*	*	*	*	*	*	*
---	---	---	---	---	---	---	---

This, I believe, fully covers all matters alluded to in your letter to J. O. W., 16th inst.

Respectfully,
(Signed)

E. R. BLISS.

[* Words and figures enclosed in brackets erased in copy.]

ELIZABETH KIRCHOFF.

261

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.
John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter,
secretary; [E. A. Warfield,*] financial agent; [R. B. Kendall,*]
attorney.

EXHIBIT 105, F. V. C.

Kendall† & Bliss, attorneys, 71 Washington street.

CHICAGO, March 9th, 1881.

Union Mutual Life Insurance Company, Boston, Mass.:

The following papers have been rec'd :

* * * * *

682, 1389, 733, 491, and 1113, abst. of Kendall's report.

(Letter Feb'y 24, '81.)

In the following fire policies have been delivered to O. W. Bar-
rett :

* * * * *

682, 1 policy (lot 10, B. 64).

* * * * *

Respectfully,
(Signed)

E. R. BLISS.

EXHIBIT 106, F. V. C.

Real-estate office of Henry C. Morey, 79 Dearborn street, room 1.

CHICAGO, M'ch 23, 1881.

Union Mutual Life Ins. Co.:

I was offered \$2,500 cash today for the 20 ft. on Chicago Av. near
Pine St., in Kirchoff loan for the certificate.

I think before the redemption runs out, which is about 10 months,
you can get the 3,000 that the certificate calls for if you desire to
hold it, as property is building up fast in that locality.

Y'es resp'y,
(Signed)

H. C. MOREY.

255

EXHIBIT 107, F. V. C.

Real-estate office of Henry C. Morey, 79 Dearborn street, room 1.

CHICAGO, M'ch 31, 1881.

Union Mutual Life Ins. Co.:

* * * * *

Was offer No. 635, Sawyer made M'ch 22nd, and Kirchoff, Chicago,
on Sat., M'ch 23d, accepted?

Hope to hear from you soon about all these and others.

Y'rs resp'y,
(Signed)

H. C. MOREY.

[* Words enclosed in brackets erased in copy.]

[† Across the face of this word are written the letters E. R.]

EXHIBIT 108, F. V. C.

Union Mutual Life Ins. Co., western department, 133 La Salle street.

John E. De Witt, pres't; Daniel Sharp, vice-pres't; Jas. P. Carpenter, sec'y; Allen G. Fowler, superintendent.

CHICAGO, May 2d, 1881.

Union Mutual Life Ins. Co.

GENTLEMEN :

* * * * *

Constable —, \$6.50 on report of same date should have been paid by receiver, but there was none at that time, so I paid the bill.

The loan is No. 682, Kirchoff.

Yours truly,

(Signed)

JAMES R. PAGE.

EXHIBIT 109, F. V. C.

Real-estate office of Henry C. Morey, 85 Washington St., [79 Dearborn street,*] room 1.

CHICAGO, May 27, 1881.

Union Mutual Life Ins. Co. :

Mr. De Witt suggests that I write you for list of prices you have the Kirchoff property marked at for sale.

I have the list that they were bid in at the mortgage sale, but not the other list.

Y'rs resp'y,

(Signed)

H. C. MOREY.

256

EXHIBIT 110, F. V. C.

(Copy.)

Loan 682.

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR : * * * Mr. Kendall in his letter of 3d inst., in relation to expenses of procuring abstract loan 682, 838, 623, 615, and 384, states that it will cost about \$1,700 less 20 % discount.

Please say to him that we see no other way but for the Co. to pay for them.

Yours truly,

(Signed)

JOHN E. DE WITT, *President*.
(F. N.)

[* Words and figures enclosed in brackets erased in copy.]

EXHIBIT 111, F. V. C.

(Copy.)

Loan 682.

BOSTON, *March 16th, '77.*

R. B. Kendall, Esq., Chicago, Ill.

D'R SIR: In your letter of M'ch 3d, '77, you state that you have no abstract for loan No. 682, Kirchhoff, for foreclosure in court.

According to our docket, copied from yours, this was foreclosed May 26, '76. If such is the case why try to foreclose a second time?

Yours truly,
(Signed)

JOHN E. DE WITT, *President.*
(F. N.)

EXHIBIT 112, F. V. C.

BOSTON, *April 5th, 1877.*

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: Yours of 3d inst. at hand in relation to loan No. 682, Kirchhoff & Diversy.

Your action in this matter is approved.

Yours truly,
(Signed)

JOHN E. DE WITT, *President.*
(F. N.)

EXHIBIT 113, F. V. C.

(Copy.)

Loan 682.

BOSTON, *May 11, 1877.*

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: We are in receipt of your four favors of 9th inst. with appraisals of property, loans 155, 833, 1607.

257 We make the following propositions with the proviso that they are satisfied by the finance committee at their next meeting on 14th inst., which we have no doubt they will approve:

* * * * *

No. 682, Kirchhoff, we suggest waiting 30 days; then, if agree't is not carried out, bring the matter to our attention.

Yours truly,
(Signed)

JOHN E. DE WITT, *President.*
(F. N.)

EXHIBIT 114, F. V. C.

(Copy of telegram.)

BOSTON, July 5, 1877.

E. A. Warfield, Boone block, 133 La Salle St. :

Can't you arrange the Kirchoff matter before you leave?

(Signed)

JOHN E. DE WITT, *Pres't.*

EXHIBIT 115, F. V. C.

BOSTON, 8, 3, 1877.

R. B. Kendall, Esq.

DEAR SIR: At a meeting of the finance committee this morning we considered the matter of the Kirchoff loan and we propose to let him have his own way about it, but get the time reduced to five years if you can.

The reasons moving the finance committee in this matter are simply these: That they deem this the easiest and quickest way to get the title to the property; that if we have to go into court to correct the defect in the title affecting the larger part of the loan, it would injure the credit of the Co. a great deal more than to allow this money to remain at 5% for so long a time, even if they pay the interest. Certainly, if they do not pay the interest, we will have perfected the title in the easiest way possible for us.

Yours truly,

(Signed)

JOHN E. DE WITT, *President.*
B.

EXHIBIT 116, F. V. C.

BOSTON, August 8th, 1877.

E. A. Warfield, Esq., Chicago.

DEAR SIR: Referring to yours of 23d July in regard to loan 682, Kirchoff, the finance committee at a recent meeting voted to extend the loan ten years at five per cent. interest, Kirchoff to pay 5% of the principal with each semi-annual interest.

Yours truly,

(Signed)

DANIEL SHARP, *Vice-Pres't.*

258

EXHIBIT 117, F. V. C.

(Copy of telegram.)

BOSTON, MASS., Aug. 16, 1877.

E. A. Warfield, financial ag't, 133 La Salle St. :

Make new loan to Kirchoff five per cent., as agreed in president's letter of third.

(Signed)

DANIEL SHARP, *Vice-Pres't.*

EXHIBIT 118, F. V. C.

BOSTON, *Sept.* 11, 1877.

DEAR SIR: Yours of 6th rec'd and, I think, unanswered; if so, say, relative to loan No. 682, Kirchoff, we agree with you, as stated in that letter, "that you had better enter a judgment at once and proceed to sell the property."

The writer expects — tomorrow m'n'g for mts., to be absent about 2 weeks.

Yours truly,
(Signed)

E. R. SECCOMB, *Sup't.*

E. A. Warfield, Esq., ag't, Chicago.

EXHIBIT 119, F. V. C.

BOSTON, 1877, 9, 22.

Rob't B. Kendall, Esq., 133 La Salle St., Chicago, Ill.

DEAR SIR: Your favor of the 18th inst. in reference to the Kirchoff case has just reached us. We think you did well to get judgment in the matter. Will it be advisable to drive them hard, and will the judgment be good if they go into bankruptcy?

We would like to have you look carefully into the bankrupt law, &c., providing they go into bankruptcy within 6 months and we do not sell the property; whether our claim on mortgage land would hold good, or whether we should be compelled to come in as common creditors.

If you think it necessary, perhaps you had better confer with some other counsel, as the interest at stake is large.

This letter will also apply to the Couch loan.

We would rather these things be nursed until I go out next month, if by so doing no security that we now hold would by the delay be released. If that is the case, protect the interest by action.

Yours truly,
(Signed)

JOHN E. DE WITT, *President.*
G. J. C.

259

EXHIBIT 120, F. V. C.

BOSTON, 1878, 1, 30.

Mr. E. A. Warfield, 133 La Salle St., Chicago.

DEAR SIR: You will oblige us with an early reply to the following: Is there not something wrong in the valuation of loan * * * 682 * * *

We have them just as you forwarded them.

* * * * *

Yours truly,
(Signed)

JOHN E. DE WITT, *Pres't.*
G. J. C.

EXHIBIT 121, F. V. C.

BOSTON, *Feb.* 12, 1878.

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: We wrote you a day or two since to attach lot 169, Grun's S. B. add'n to Chicago, security to loan No. 359, Kirchoff.

As we find by Mr. Kendall's letter of 17th ult. that the title is in Amanda S. Cook, we are of the opinion that we cannot attach the land for Kirchoff debt, loan 682.

We should like to know how the lot stands—whether taxes are paid, &c.

Yours truly,
(Signed)

JOHN E. DE WITT, *President.*
(F. N.)

EXHIBIT 122, F. V. C.

BOSTON, 1878, *Feb.* 13th.

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: Yours of 11th inst. at hand relative to Kirchoff loan in which Co. has no title (No. 682).

As we understand the matter now the Co. has no title to the 12 lots, but they are covered by the judg't which has been entered up on the note. Are we not right? Please call my attention to this matter on my next visit to Chicago.

We do not need certificate of valuation loan No. 1376, Hilliard, now loan 579. Valm. should be as you stated, \$4,000 & \$2,000.

Yours truly,
(Signed)

JOHN E. DE WITT, *President.*
F. N.

260

EXHIBIT 123, F. V. C.

(Copy.)

Loan 682.

BOSTON, 1878, 3, 26.

Mr. E. A. Warfield, 133 La Salle St., Chicago.

DEAR SIR: We hand you herewith fire policies expiring as follows:

* * * * *

Loan 682, No. 1605—Prescott, \$1,500—expires 4, 1, '78.

Yours truly,
(Signed)

JOHN E. DE WITT.

EXHIBIT 124, F. V. C.

BOSTON, 4, 25, 1878.

Mr. R. B. Kendall, 133 La Salle St., Chicago.

DEAR SIR: Don't push the foreclosure proceeding in the Kirchoff-Diversy and Crawford cases until the time of their voluntary or involuntary bankruptcy has expired, so far as it refers to our judgment being a prior lien on their unincumbered property.

Yours truly,

(Signed)

JOHN E. DE WITT, *Pres't.*
C.

EXHIBIT 125, F. V. C.

(Copy.)

BOSTON, Aug. 6, 1878.

E. A. Warfield, Esq., Chicago. Ill.

D'R SIR: Loan 682. You charge \$2.40 for expenses Mr. Rees' acc't, appraisal Diversy land. Please have the appraisal papers forwarded to this office. * * *

Yours truly,

(Signed)

JOHN E. DE WITT.

EXHIBIT 126, F. V. C.

BOSTON, Aug. 14th, 1878.

R. B. Kendall, Esq.

DEAR SIR: Yours of 9th at hand. Have the land that you speak of in the Kirchoff-Diversy loan surveyed by a surveyor and get the exact am't covered by our m'tg'e.

Note your comments ab't the new developments in the case—that is, in regard to the \$8,000 judgment. Make very thorough, careful, and prudent examination of the status of it and make up a written report of the situation. Furthermore, do not let us get into the same position in this matter that you let us run into in the case of Neely & Dobbins.

Another point, probably, for you to examine into is how much property besides that covered by one m'tg'e is covered by this judgment, and if the judgment holds good whether it is not advisable for us to buy it and commence to sell other properties first to satisfy it, and in that way protect our interest in this property covered by the m'tg'e.

When Mr. Sharp goes out show him this letter and talk it over with him.

Referring to the Neely & Dobbins matter, it seems to me we ought to get that settled up pretty soon. We do not care to pay 10 % for money that is lying in the bank at 2 %.

Yours truly,

(Signed)

JOHN E. DE WITT, *President.*
B.

EXHIBIT 127, F. V. C.

BOSTON, 1878, *October 4th.*

Rob't B. Kendall, Esq., Chicago, Ill.

D'R SIR: Your report on sundry matters, dated Sept. 20, '78, is at hand, and we call your attention to the following cases in addition to those referred to in said report:

* * * * *

682, Kirchoff, tax deed, \$2,200, to come to judg't, looked into and land surveyed. * * *

Yours truly,
(Signed)

JOHN E. DE WITT, *President.*
F. N.

EXHIBIT 128, F. V. C.

(Copy.)

Loan 682.

BOSTON, 1878, *October 4th.*

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: Please furnish information relating to the following cases, viz: * * *

No. 682, Kirchoff. Aug't 6 wrote you for valuation papers Diversy land.

Yours truly,
(Signed)

JOHN E. DE WITT, *President.*

262

EXHIBIT 129, F. V. C.

(Copy.)

Loan 682.

BOSTON, *Oct. 11, '78.*

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: We forward you by express today the following valuations, as requested in president's telegram of 16th inst.: * * *

No. 682; Morey, 1; Rees, 1.

Yours truly,
(Signed)

J. P. CARPENTER, *Sec'y.*
F. N.

EXHIBIT 130, F. V. C.

(Copy.)

Loan 682.

BOSTON, *Nov. 4, '78.*

E. A. Warfield, Esq.

DEAR SIR: * * * In addition to the properties you have mentioned, I would also suggest the appraisement of the Burroughs and Kirchoff loans.

In the first can draw the particular attention of the appraisers to the prorating of the m'tg'e on different lots, and, if they did not before have them, this time appraise the same according to lots.

We have Mr. Rees' individual appraisement, but we prefer, of course, to have the joint opinion of all three, as in all other cases.

Yours truly,
(Signed)

JOHN E. DE WITT, *Pres.*
(B.)

EXHIBIT 131, F. V. C.

(Copy.)

Loan 682.

Boston, Nov. 5th, 1-78.

Rob't B. Kendall, Esq., Chicago, Ill.

DEAR SIR: We call your attention to the following cases: No. 682, Kirchhoff. We do not find that you have attended to having the land surveyed and looked into the matter of \$8,000 judgment, as requested in our letter of Aug. 4, '78. Please make report. * * *

Yours truly,
(Signed)

JOHN E. DE WITT, *President.*
(F. N.)

263

EXHIBIT 132, F. V. C.

(Copy.)

Loan 682.

Boston, Nov. 1, '78.

R. B. Kendall, Esq., Chicago, Ill.

D'R SIR: Kirchhoff—all we want in this case is to know where we are.

Yours truly,
(Signed)

JOHN E. DE WITT.
F. N.

EXHIBIT 133, F. V. C.

Boston, Nov. 14, 1878.

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: We received recently from you all of the valuations (or appraisal papers) which were sent to you on the 11th of Oct. except those relating to loans No. 150, No. 682, and No. 730.

Please return those also.

Yours truly,
(Signed)

JOHN E. DE WITT, *Pres.*
(F. N.)

EXHIBIT 134, F. V. C.

BOSTON, Dec. 3, 1873.

E. A. Warfield, Esq., 133 La Salle St., Chicago.

DEAR SIR: Valuation papers on loan- 150, 682, & 730, enclosed in your favor of 30th ult., came duly to hand today.

Yours truly,

(Signed)

JOHN E. DE WITT, *Pres.*
C.

EXHIBIT 135, F. V. C.

153 TREMONT STREET, BOSTON, Jan'y 9th, 1879.

R. B. Kendall, Esq., Chicago.

DEAR SIR: Your favor of 1st inst., responding to ours of 20th Dec'r, duly received. It is quite evident to us that the Hon. Wm. J. Campbell, to whom you refer, will be unable to render the required service in the several cases in which we directed you to associate Mr. Sleeper with yourself, as we presume he will be required to pass the winter at Springfield. If any of the cases to which we referred in our said letter are near a final settlement, that is all we want, but if they are in the same condition as when we wrote we confirm our instructions as given to you on the 20th December.

264 In the matter of the Kirchoff case, if a settlement can be made which shall include Mrs. Diversy's suit and complications of every name and nature and attending costs by Mrs. Diversy retaining the 40 acres the other side of the railroad track, as shown — you to the writer, with all needful quitclaim deeds from parties in interest, so that our title will be unquestioned to the whole property which we then hold, we will consent to let her keep the 40 acres rather than prolong the case in court. If, however, she declines, we wish you to push the matter as before advised.

Yours truly,

(Signed)

DANIEL SHARP, *V. Pres.*

EXHIBIT 136, F. V. C.

BOSTON, 18th Jan'y, 1879.

R. B. Kendall, Esq.

DEAR SIR: Your favor of 14th duly received. We notice what you say relative to the Kirchoff cases and the suit now pending in the supreme court of your State, Johnson *vs.* Diversy. If a settlement can be made, we wish it to include everything except this suit. It — to us that even a better settlement than you have suggested could be made. Will you please talk the matter over with Mr. Warfield and see if you can agree with him on a plan of settlement? We should also like you to confer with him on a com-

promise settlement of the \$1,500 note, to which you refer. We shall undoubtedly be satisfied with a plan which will have your united endorsement.

Yours truly,
(Signed)

DANIEL SHARP, *V. P.*

EXHIBIT 137, F. V. C.

BOSTON, *Mch* 14, 1879.

R. B. Kendall, Esq., 133 La Salle St., Chicago.

DEAR SIR: We desire to call your particular attention to the following loans, the overdue interest on which is now very large and daily increasing. * * *

* * * 682, Kirchoff. * * *

We wish vigorous measures to be taken in all the above cases that will permit of it and wish matters pushed to a speedy settlement.

We have no desire to make such an exhibit of overdue interest on a few loans at the end of the present year, as we are compelled to at the beginning.

Yours truly,
(Signed)

JOHN E. DE WITT, *Pres't.*
C.

265

EXHIBIT 138, F. V. C.

BOSTON, *May* 1st, 1879.

E. A. Warfield, Esq.

DEAR SIR: Referring to the loan to the South Park commission, 682* did you think to write them that letter that I suggested you write them, saying we would be willing to accept the money, if they were ready to pay it, with int. up to date of payment?

Yours truly,
(Signed)

JNO. E. DE WITT, *Pres.*
B.

EXHIBIT 139, F. V. C.

BOSTON, *May* 27, 1879.

Rob't B. Kendall, Esq., Chicago, Ill.

D'R SIR: We call your attention to the following matters with the hope of finding in your next monthly report a goodly number straightened out in a satisfactory manner:

* * * * *

682, Kirchoff, tax deed, \$2,200 to come.

* * * * *

We are not quite out of material, and if what we call for is disposed of before June 1st we shall be most happy to contribute again upon application.

Yours truly,
(Signed)

JOHN E. DE WITT, *President*.
F. N.

EXHIBIT 140, F. V. C.

153 TREMONT STREET, BOSTON, Oct. 16, 1879.

E. A. Warfield, Esq., 133 La Salle St., Chicago.

DEAR SIR: Will you kindly inform us when we may expect to get the Kirchoff loan, No. 682, in shape for closing it up? We would like this matter wound up at as early a date as possible.

Yours truly,
(Signed)

JOHN E. DE WITT, *Pres.*
C.

266

EXHIBIT 141, F. V. C.

(Copy.)

BOSTON, Nov. 1st, 1879.

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: In the Kirchoff matter we would request that a settlement be effected as soon as possible. Dr. Boone, we suppose, is at home now and will give his attention to the part required of him.

Have you possession of the house?

* * * * *

We do not wish the above matters to lay over Jan'y 1st next, and for that reason urge your attention to the same.

* * * * *

Yours truly,
(Signed)

JOHN E. DE WITT, *President*.
F. N.

EXHIBIT 142, F. V. C.

153 TREMONT STREET, BOSTON, Nov. 3, 1879.

Rob't B. Kendall, Esq., Chicago, Ill.

D'R SIR: We are in receipt of your favore of 1st inst., with a number of deeds for execution, among which we find one covering lot 2, bl'k 21, Canal Trustees' subd. of sec. 3, T. 39, being a part of security to No. 682, Kirchoff. We notice that in this case you make mention of a special letter, which letter we do not find, and would ask by what authority this lot is sold for \$7,000, and why the proposition comes through you (as we infer it does) by a special letter, instead of Mr. Warfield.

If the communication you refer to had come to hand with the deed, we might have presented it to our financial committee tomorrow; but as it is we do not understand the matter.

Yours truly,
(Signed)

JOHN E. DE WITT, *President.*
F. N.

EXHIBIT 143, F. V. C.

153 TREMONT STREET, BOSTON, Nov. 5, 1879.

E. A. Warfield, Esq., 133 La Salle St., Chicago.

DEAR SIR: We have today written Mr. Kendall that the Kirchhoff offer was declined and we will not sell for less than eighty-four hundred dollars.

We want you to take possession of the house, and as soon as the matter is closed up please advise us.

Yours truly,
(Signed)

JOHN E. DE WITT, *Pres't.*
C.

267

EXHIBIT 144, F. V. C.

(Copy.)

BOSTON, Nov. 5, 1879.

Rob't B. Kendall, Esq., Chicago, Ill.

DEAR SIR: Your favor of 1st is at hand and submitted to our financial committee yesterday at their regular meeting.

They declined to sell the property mentioned to Mr. Kirchhoff or anybody else for \$7,000. They will at any time within the next 30 days sell it to Mrs. Kirchhoff on the following terms and conditions: For \$8,400, one-quarter cash, balance to be paid in 20 semi-annual payments, interest at 6 % per annum.

The committee feel in dealing with a man who has so little regard for his promise to pay, together with the fact that there is a 15 mos.' equity of redemption in your State—they feel that they must have a considerable margin of the amount down. They would not sell to anybody without a payment down. They would not sell the other lot to Mr. or Mrs. Kirchhoff except for cash, and at a price to be named if they want it.

Yours truly,

JOHN E. DE WITT, *Pres't.*

EXHIBIT 145, F. V. C.

BOSTON, Nov. 14, 1879.

Rob't B. Kendall, Esq., Chicago, Ill.

DEAR SIR: We should like a full report upon the present condition of 682, Kirchhoff. This is a case that must be fixed up before the end of the year, and we urge upon you the necessity of pushing the matter to a close.

* * * * *

We are anxious to have both disposed of as soon as possible.

Yours truly,

(Signed)

JOHN E. DE WITT, *President*.
F. N.

EXHIBIT 146, F. V. C.

(Copy.)

BOSTON, *December 5th*, 1879.

E. A. Warfield, Esq., 133 La Salle St., Chicago:

Send valuation of Maher, also of Kirchoff, property if any increase since last valuation.

Send tax vouchers for recent charges. All in Saturday's mail.

(Signed)

JOHN E. DE WITT, *Pres't*.
F. N.

268

EXHIBIT 147, F. V. C.

153 TREMONT STREET, BOSTON, *Dec. 3*, 1879.

E. A. Warfield, Esq.

DEAR SIR: Your favor of the 26 at hand in reference to loan 682, Kirchoff. If he does not pay rent, you have the usual remedy at hand—to put him out—and there is no reason why you should not.

Yours truly,

(Signed)

JOHN E. DE WITT, *Pres't*.
W. G. R.

EXHIBIT 148, F. V. C.

(Copy.)

DEC. 5TH, 1879.

E. A. Warfield, Chicago, Ill.

D'R SIR: We telegraphed you today (half-rate message): "Send valuation of Maher and also Kirchoff property, if any increase since last valuation. Send tax voucher for recent changes. All by Saturday's mail."

The Kirchoff property we shall be obliged to divide on our real-estate ledger, and we would ask you to separate the following items of expense, in order that they may appear in proper amounts against the different pieces, and any charges hereafter are to be treated in the same way: \$32.57, \$321.54, \$302.09, \$1,000, \$3.83, \$10, \$21.91, \$7.50, \$20, \$28, \$17.40, \$17.11, \$141.93, \$131.73, \$82.16, \$263.07, \$123.64, \$28.32 (this was a part of Hamilton \$2,000), \$244, \$153.40, \$0.70, \$5, \$88, \$1.95, \$5, \$2,200, \$2.40 (expenses to Winnetka), \$29, \$176.52, \$17.39, \$3.12, \$743.57, \$129.04, \$305.69, \$362.33, \$46.12, \$6, \$47.25, \$0.65, \$1.65, \$389.90, \$128.73, and \$0.90.

Would also like separate valuations of bl'k 12 and E. 3 and one-tenth acres, bl'k 3, Lill and heirs of Diversy div'n of S. W. $\frac{1}{2}$, N. W. $\frac{1}{4}$, sec. 29, T. 40, both having been appraised together at \$15,000.

Yours truly,
(Signed)

JOHN E. DE WITT, *Pres't.*
F. N.

EXHIBIT 149, F. V. C.

153 TREMONT STREET, BOSTON, *Dec. 17th, 1879.*

E. A. Warfield, Esq., Chicago, Ill.

DEAR SIR: Loan No. 682. Your favor of 8th inst. has our attention. We cannot forward the vouchers as requested, for they are fastened in our report books, but we herewith enclose copies of the same, excepting those relating to taxes, with which you are, no doubt, familiar and can separate without our assistance.

Yours truly,
(Signed)

DANIEL SHARP, *Vice-Pres't.*
B.

EXHIBIT 150, F. V. C.

153 TREMONT STREET, BOSTON, *Dec. 23, 1879.*

R. B. Kendall, Esq., 133 La Salle St., Chicago.

DEAR SIR: Your favor of the 12th inst. with copy of opinion in the Kirchhoff (No. 682) case at hand and contents noted.

The "opinion" is today returned by express. Please lay it before Pres't De Witt for his examination.

Yours truly,
(Signed)

DANIEL SHARP, *Vice-Pres't.*
C.

EXHIBIT 151, F. V. C.

Registered.

153 TREMONT STREET, BOSTON, *Dec. 26, 1879.*

E. A. Warfield, Esq., 133 La Salle St., Chicago.

DEAR SIR: Herewith find the two tax vouchers on No. 682, asked for in your favor of the 23d inst.

Yours truly,
(Signed)

DANIEL SHARP, *Vice-Pres't.*
C.

EXHIBIT 152, F. V. C.

153 TREMONT STREET, BOSTON, *Jan'y 8th, 1880.*

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: Yours of 5th inst. at hand regarding items on No. 682, Kirchhoff property. As we have no vouchers at this office for the

following items for taxes, we must again call for a subdivision of the same that we may charge up to the different pieces the proper amounts.

We would also like the vouchers themselves.

Gen'l tax 1875.....	\$354 11,	costs 24 79
Tax deed (Hamilton).....	302 09,	"
" " (Carbine).....	1,000	"
1st Lincoln park.....	25 34	1 78
Gen'l tax 1876 & forf.....	21 91	55
2d Lincoln park.....	17 11	85
Gen'l tax 1876.....	270 16	13 50
City specials.....	165 76,	costs 8 29
Gen. tax 1876.....	163 03,	" 8 15
" " 1872.....	117 75,	" 5 89
Tad deed (Haas).....	153 40,	"
Gage tax claims.....	2,200	"
Tax deed....	45	" 1 12
" ".....	45	" 2 25
" ".....	151 31,	" 7 57
Taxes, 1878.....	110 42,	" 2 76
" ".....	114 45,	" 2 87

270 There is a credit of \$920 on acc't of taxes, which please subdivide and state which amounts it applies to, that hereafter we may not be calling for vouchers for amounts which are considered paid.

EXHIBIT 153, F. V. C.

153 TREMONT STREET, BOSTON, *Jan. 13, 1880.*

R. B. Kendall, Esq., 133 La Salle St., Chicago.

DEAR SIR: Your favor of the 10th inst. relative to 682 682, Kirchoff, at hand.

Vice-Pres't Sharp will be in your city in the course of a week or ten days, and you will please refer the matter to him.

The papers mentioned in your second favor of above date at hand, and note your remarks relative to No. 879.

Yours truly,

(Signed)

JOHN E. DE WITT, *Pres't.*
C.

EXHIBIT 154, F. V. C.

153 TREMONT STREET, BOSTON, *January 16th, 1880.*

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: Yours of 13th inst. at hand in relation to items against property No. 682, Kirchoff.

As the vouchers "given Mr. Kendall long ago for use as evidence in the foreclosure case" are not at this end of the line, we must call upon you again to furnish us with such information as will assist

us in making a correct subdivision of the amounts. The vouchers \$110.42 and \$114.45 were forwarded you Dec. 26, '79. Please ascertain on what particular property these amounts were paid and let us know. We are anxious to get this matter straightened out as soon as possible.

Yours truly,
(Signed)

JOHN E. DE WITT, *President*.
F. N.

EXHIBIT 155, F. V. C.

(Copy.)

Boston, *February 5th*, 1880.

E. A. Warfield, Esq., Chicago, Ill.

DE. SIR: We have been looking over your receivership and rent account for January and we wish to call attention particularly to the following:

* * * * *

No. 682, Kirchhoff, \$317.25 due.

271 In the case of No. 682 you have been instructed to turn Kirchhoff out unless rent was paid up, and we are at a loss to know why you give no heed to our wishes in this matter. Please explain.

* * * * *

Yours truly,
(Signed)

JOHN E. DE WITT, *Pres't*.
F. N.

EXHIBIT 156, F. V. C.

Boston, *March 2d*, 1880.

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: To which piece or pieces of the Kirchhoff property does the 60c. for recording Q. C. deed, Hamilton to Co., apply? Charged under date of Feb. 28, '80.

Yours truly,
(Signed)

JOHN E. DE WITT, *President*.
F. N.

EXHIBIT 157, F. V. C.

(Copy.)

Registered.

Boston, *March 8*, 1880.

E. A. Warfield, Esq., Chicago, Ill.

DEAR SIR: Sunday favor at hand. Referring to yours of the 5th inst., we should have given the date of charge as 23d Feb. instead

of 28th. We had Mr. Bliss' voucher in mind when writing for information, but confounded the dates.

* * * * *

Yours truly,
(Signed)

JOHN E. DE WITT, *President*.
F. N.

EXHIBIT 158, F. V. C.

153 TREMONT STREET, BOSTON, *Mar. 20, 1880.*

Rob't B. Kendall, Esq., 133 La Salle St., Chicago.

DEAR SIR: Quitclaim of tax title, Hamilton to Co., of portion of security to former loan 682, inclosed in your favor of the 18th inst., duly received.

Yours truly,
(Signed)

DANIEL SHARP, *Vice-Pres't*.
C.

272

EXHIBIT 159, F. V. C.

BOSTON, *Ap'l 20th, 1880.*

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: Please inform us as to which particular portion of the Kirchoff property the \$5.12 (charged to company Ap'l 14th) belongs.

Yours truly,
(Signed)

DANIEL SHARP, *Vice-Pres't*.
F. N.

EXHIBIT 160, F. V. C.

BOSTON, *May 7th, 1880.*

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: We notice that the uncollected rent on the Kirchoff property is on the increase, and would ask why steps have not been taken to have the tenant removed. The matter has been brought to your attention more than once, and we desire that some action be taken at once to get a new party to take the house from whom rent can be collected.

Yours truly,
(Signed)

JOHN E. DE WITT, *President*.
F. N.

EXHIBIT 161, F. V. C.

153 TREMONT STREET, BOSTON, *June 1st, 1880.*

E. A. Warfield, Esq.

DEAR SIR: Yours of the 28th, relative to Kirchoff, at hand. We think the only proper way for you to do is to take possession of the property that Kirchoff is now occupying.

Yours truly,
(Signed)

JOHN E. DE WITT, *Pres't*.
B.

EXHIBIT 162, F. V. C.

153 TREMONT STREET, BOSTON, *June 9th, 1880.*

E. A. Warfield, Esq., Chicago, Ill.

D'R SIR: Yours of the 7th inst. at hand.

The deed from Mrs. Diversy conveys "the N. 15 acres of the N. E. quarter of the S. E. quarter and the E. half of the N. E. quarter of section 28, township 42 N., R. 13 E., of 3d P. M., excepting, however, from this conveyance so much of said E. half of N. E. quarter of section 28 as is described in a deed from the said Angela Diversy to

273 Jacob Schmidt, dated the 21st day of Nov., 1870, and recorded in the recorder's office for said county of Cook, Book 631, p. 32, and also excepting a strip of land six rods wide heretofore conveyed to the Chicago & Milwaukee R. R."

Yours truly,

(Signed)

JOHN E. DE WITT, *President.*
F. N.

EXHIBIT 163, F. V. C.

153 TREMONT STREET, BOSTON, *Oct. 19, 1880.*

Rob't B. Kendall, Esq., Chicago, Ill.

D'R SIR: We quote from Mr. Warfield's letter of Aug't 5, '80:

"The taxes on lot 26 of bl'k 28, in Rose's subd'n, W. $\frac{1}{2}$ sec. 5, 39, 14, have been paid by Gage for some years. I think Mr. Hamilton understands that the Co. has no title to this lot. It is my impression that the title is good in the Co., subject to Gage tax deeds, but I may be in error."

A copy of the letter from which the above is taken was sent you a short time since, & we would like you to report on the title to the land above referred to. Please do so at once.

Yours truly,

(Signed)

JOHN E. DE WITT, *President.*
F. N.

EXHIBIT 164, F. V. C.

BOSTON, *Nov. 2, 1880.*

Rob't B. Kendall, Esq., Chicago, Ill.

D'R SIR: Yours of 27th inst. at hand in relation to claim of the Government against a portion of the Kirchoff property, No. 682.

We cannot find that you state in your letter for what amount (or give an approximate of amount for which) the claim can be settled. If you can inform us what the figures are, we can then determine where we stand.

Yours truly,

(Signed)

JOHN E. DE WITT, *Pres't.*
F. N.

EXHIBIT 165, F. V. C.

BOSTON, Nov. 4th, 1880.

Rob't B. Kendall, Esq., Chicago, Ill.

D'R SIR: Yours of 2d inst., with 15 master's cert's of property, No. 682, Kirchhoff, at hand.

We approve everything from beginning of your letter to the period after your name.

Yours truly,
(Signed)JOHN E. DE WITT, *President*.
F. N.

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EXHIBIT 166, F. V. C.

BOSTON, Nov. 11th, 1880.

Rob't B. Kendall, Esq., Chicago, Ill.

S'R SIR: Your draft for master's commissions, costs, &c., in the Kirchhoff case has been paid.

Kindly forward the receipted bill for the \$907.77.

Yours truly,
(Signed)JOHN E. DE WITT, *President*.
F. N.

EXHIBIT 167, F. V. C.

BOSTON, Nov. 15, 1880.

Rob't B. Kendall, Esq., Chicago, Ill.

D'R SIR: Yours of 13th at hand, with receipted bill for costs, com's, &c., No. 682, Kirchhoff.

Yours truly,
(Signed)JOHN E. DE WITT, *President*.
F. N.

EXHIBIT 168, F. V. C.

Statement of Account of Lot 2, Block 21, C. T. Sub., Kirchhoff, to Oct. 1, '86.

1876.		DR.	
Nov.	25. Tax deed, Hamilton	390	93
Dec.	13. 1st, L. park	13	51
1877.			
Feb.	5. " "	2	40
Aug.	1. Examination for judg't.	1	52
Sept.	17. Abstract.	12	53
	25. 2d, L. park	10	72
Oct.	13. City special & costs	51	50
	16. State & county tax & costs.	107	31
	22. " " " "	77	50
Dec.	31. Costs.	4	29

1878.			
Feb.	22.	Abstract.....	53 33
M'ch	14.	Tax deed & recording.....	96 60
July	11.	Court fees	76
"	20.	Tax paid Gage	332 97
Aug't	10.	Court fees	4 37
Oct.	12.	3d, L. park & costs.....	12 25
	24.	1877, general tax & costs	175 92
Nov.	22.	1873 & '4 " " "	166 35
275			
1879.			
Feb.	3.	Abstract... ..	91
June	14.	Legal expense.....	1 52
Aug.	11.	Tax deed & costs	59 27
	25.	Recording	37
Nov.	3.	1878, taxes & forf.....	199 35
"		Special & costs	128 73
	10.	Recording	14
1880.			
Feb.	16.	Court fees	1 13
	28.	Recording	37
M'ch	18.	"	75
Apr.	14.	Marshall's fees	92
May	31.	General taxes, 1879.....	82 25
"		5, Lincoln park	10 47
"		Fire insurance....	18 75
Nov.	9.	Master's fees	137 39
1881.			
Apr.	30.	Taxes, 1880.....	125 63
"		Specials.....	10 07
Feb.	2.	Abstract.....	20 00
"		Cancelling tax ctfs.....	1 30
May	9.	Fire insurance.....	12 00
Dec.	28.	Tax deed.....	2 68
"		" " "	3 21
"		" " "	3 20
"		Expenses procuring deed.....	15 00
1882.			
Jan.	21.	Recording master's deed.....	90
"		Master's charge for deed.....	2 40
May	1.	Tax of 1881	84 43
"		Lincoln Park tax... ..	6 94
June	21.	Court costs	1 50
July	17.	Abstract.....	7 50
Oct.	1.	Insurance	8 00
	16.	Deed.....	100 00
Dec.	19.	Cancel judg't	25
	12.	Abstract.....	8 00

This statement does not include
balance of interest or cost of
collecting rent.

1883.

Apr.	3.	Carpenter repairs ..	200 00
May	21.	Tax 1882 & costs ..	141 75
"		8th, Lincoln park ..	9 51
July	14.	Water tax ..	60 50
Nov.	8.	Fire insurance ..	15 00

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1884.

Apr.	28.	Taxes 1883 ..	175 22
"		9, Lincoln park ..	8 88
"		Cost on 1883 taxes ..	4 61
May	24.	Paid U. S. Gov't for deed ..	500 00
June	20.	Sidewalk ass't.	40 32
Aug.	30.	Advertising sale by U. S. Gov't.	19 50
Sept.	22.	Recording Gov't deed ..	1 05
Oct.	27.	Fire insurance ..	15 00
	18.	Notorial affidavit ..	25
	22.	Constable fees (Donlin case) ..	25 00
Nov.	20.	Justice fees " " ..	2 75
	21.	Lee & Lee, reporters ..	10 10
Dec.	31.	Getting possession of barn ..	3 40

1885.

M'ch	24.	Repairing roof ..	55 00
Apr.	27.	Taxes 1884 & costs ..	176 84
June	25.	Repairing chimney ..	6 00
Sept.	7.	Legal expenses ..	41 50
Oct.	16.	Fire insurance ..	15 00
Sept.	26.	Water tax ..	7 50
Oct.	29.	Special tax ..	68 13

1886.

Feb'y	6.	Costs on distress warrant ..	5 00
M'ch	12.	Repairs on barn ..	12 00
Apr.	15.	Taxes 1885 & costs ..	186 34
"		Special tax ..	8 08
June	3.	" " ..	475 49

1879.

CR.

Jan'y	23.	Rebate on ac. taxes ..	139 34
Dec.	23.	" " " ..	70 95

1880.

May	28.	" " fire ins.	18 75
		Rent for 1883 ..	480 00
		" " 1884 ..	541 00
		" " 1885 ..	720 00
		" to Oct. 1, '86 ..	300

277 *Statement of Account Lot 4, Block 21, C. T. Sub., Kirchoff, to Oct. 1, '86.*

1876.		Dr.		
Nov.	25.	Tax deed, Hamilton	232	70
Dec.	1.	1st, Lincoln park....	8	00
1877.				
Feb'y	5.	" "	1	43
Aug.	1.	Examination of judg't....		90
Sept.	17.	Abstract.....	7	47
	25.	2d, Lincoln Park tax....	6	39
Oct.	13.	City specials & costs.....	30	66
	16.	State & county tax & costs.....	63	88
	22.	" " " "	46	14
Dec.	31.	Costs..	2	55
1878.				
Feb'y	22.	Abstract.....	31	67
Mar.	14.	Tax deed & recording.....	57	50
July	11.	Court fees.....		45
	20.	Tax paid Gage.....	198	20
Aug.	10.	Court fees.....	2	61
Oct.	12.	3d, L. park & costs.....	5	13
	24.	1877, general taxes & costs.....	47	02
Nov.	22.	1883 & '4, taxes & costs.....	63	85
1879.				
Feb.	3.	Abstract.....		54
June	14.	Legal expenses		90
Aug.	11.	Tax deed & costs.....	99	61
	25.	Recording.....		23
Nov.	3.	1878, tax & forf.....	42	23
	10.	Recording.....		08
1880.				
Feb.	16.	Court fees.....		68
	28.	Recording		23
M'ch	18.	"		45
Apr.	14.	Marshall's fees.....		46
May	31.	General taxes, 1879.....	82	26
"		5th, Lincoln park	4	18
Nov.	9.	Master's fees.....	81	78
1881.				
Apr.	30.	Tax 1880.....	41	21
"		Special.....	4	02
Feb.	2.	Abstract.....	20	00
"		Cancelling tax cts.....	1	30

This statement does not include balance of interest.

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Oct.	29.	Sidewalk ass't.....	35 00
Dec.	28.	Tax deed.. . . .	3 21
"	"	2.....	3 20
"		Expense procuring deed.....	15 00
1882.			
Jan.	21.	Recording master's deed.....	90
"		Master's charges for deed.....	2 40
May	1.	Taxes 1881.....	84 43
"		Lincoln park.....	6 94
Dec.	19.	Recording.....	60
1883.			
May	21.	Tax 1882 & costs.....	72 97
"		8, Lincoln park & costs.....	4 22
1884.			
May	28.	Taxes 1883 & costs...	49 54
"		9, L. park & costs.....	3 55
1885.			
Ap'l	27.	Taxes 1884 & costs.....	49 80
Oct.	29.	Special tax.....	3 80
1886.			
Apr.	15.	Taxes 1885 & costs.....	51 28
"		Special.....	3 23
June	3.	".....	10 28
1879. CR.			
Jan.	23.	Rebate on ac. taxes.....	82 15
Dec.	23.	" " "	42 23

EXHIBIT 169, F. V. C.

Union Mutual Life Ins. Co., No. 133 La Salle street, room 15.

John E. De Witt, president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

CHICAGO, ILL., — — —, 187—
10, 27, '79.

Union Mutual Life Insurance Company, 133 La Salle St.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

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Stipulation.

STATE OF ILLINOIS, }
 Cook County. }

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF	}	General No., 41522. Term No., 129.
<i>vs.</i>		
THE UNION MUTUAL LIFE INSURANCE COM-		
PANY.		

Bill to inforce specific performance of contract.

A notice in this case, under our statute, having heretofore been given to take the deposition of C. L. Drummond, of Portland, Maine, on oral interrogatories, on the 27th inst., it is hereby stipulated that said deposition may be taken on the twenty-ninth instead of the twenty-seventh.

It is also stipulated that the deposition of Mr. E. R. Seccomb shall be taken at the same time & before the same officer who takes the deposition of C. L. Drummond, said last deposition being taken by consent and notice waived, subject to the usual exceptions.

It is also stipulated that the defendant shall not object to a continuance of the present case if the complainant shall want a continuance.

Chicago, Sept. 21, 1886.

LEONARD SWETT,
Sol. for the Defendants.
 W. S. HARBERT,
Sol'r for Comp't.

STATE OF ILLINOIS, } ss :
 Cook County, }

Circuit Court of Cook County, August Term, 1886.

ELIZABETH KIRCHOFF	}	In Chancery.
<i>vs.</i>		
UNION MUTUAL LIFE INSURANCE COMPANY.		

To W. S. Harbert, solicitor for complainant:

Take notice that on the thirteenth day of September, 1886, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the undersigned will sue out of the office of the clerk of said court a *dedimus potestatem* or commission under the seal of said court, directed to Fred. V. Chase, a notary public of the city of Portland, in the county of Cumberland and State of Maine, or to any judge, master in chancery, notary public, or justice of the peace of the county last named, to take the depositions of John E. De Witt and Charles L. Drummond upon interrogatories to be propounded to said witnesses orally, to be read in evidence on the part of the said defendant on the trial of the above-entitled cause.

Further take notice that said depositions will be taken at the office of the Union Mutual Life Insurance Co., in the city of Portland, county & State aforesaid, and the examination of said witnesses under said commission will be begun on Monday, the twenty-seventh day of September, 1886, at 10 o'clock a. m., and will continue from day to day until completed, at which time and place you may appear and cross-examine if you see fit.

Dated September 3d, 1886.

SWETT, GROSCUP & SWETT,
Sole's for Defendant.

Rec'd a copy of above this 3d day of September, 1886.

W. S. HARBERT,
Sol'r for Comp't.

Oral Int. Dedimus.

STATE OF ILLINOIS, }
County of Cook, } ss :

The People of the State of Illinois to Fred. V. Chase, Esq., notary public, Portland, Maine:

Whereas it has been represented to us that John E. De Witt and Charles L. Drummond are material witnesses in a certain cause now depending in our circuit court of Cook county, in and for the county of Cook aforesaid, between Elizabeth Kirchoff, plaintiff, and Union Mutual Life Insurance Company, defendant, and that the said witnesses reside at Portland, Maine, aforesaid, without the State of Illinois, and that their personal attendance cannot be procured at the trial of the said cause: Now, know ye that we, in confidence of your prudence and fidelity, have appointed you a commissioner to examine the said witnesses, and do therefore authorize and require you to cause the said witnesses to come before you, at the office of said insurance company, at the city of Portland, State of Maine, on Monday, Sept. 27th, 1886, 10 o'clock a. m., and on the oath or affirmation of the said witnesses, by you first duly in that behalf administered, faithfully to take the deposition of the said witnesses upon all interrogatories to be propounded to them orally, pursuant to the notice attached to these presents, both on the part of the said plaintiff and of the said defendant, and none others, and the same when thus taken, together with this commission and the said interrogatories, to certify into our said circuit court of Cook county with the least possible delay.

Witness Henry Best, clerk of our said court, and the seal
[SEAL.] thereof, at Chicago, in said county, this 13th day of September, A. D. 1886.

HENRY BEST, *Clerk.*

And the defendant thereupon offered in evidence the contract between the Union Mutual Life Insurance Company and Edwin A. Warfield, dated 21st day of February, 1878.

281 To the introduction of which said contract the complainant then and there objected as immaterial, which objection the court overruled; to which ruling the complainant then and there excepted, and the said contract was then read in evidence and is in the words and figures as follows:

Form 164.

Union Mutual Life Insurance Co. of Maine.

This agreement made this 21st day of February A. D. 1878 by and between the Union Mutual Life Insurance Company of Maine, party of the first part, and Edwin A. Warfield party of the second part, witnesseth.

That the said party of the first part hereby agrees to employ the said party of the second part at the annual compensation of thirty-five hundred dollars, payable in semi-monthly installments, on the first and fifteenth of each and every month during the continuance of this agreement.

That the said party of the first part further agrees to pay the necessary travelling expenses actually incurred by the said party of the second part, while actually engaged in the prosecution of the business of said party of the first part, away from his place of residence, which for the purposes of this contract is known as Chicago, Cook Co. Illinois.

That the said party of the second part hereby agrees to enter the service of the said party of the first part and to devote his whole time and energies in advancing the interest of the said party of the first part in such manner as may be directed by the officers of said company.

It is further understood and agreed that if the said party of the second part has at any time held any relation to this company, as agent or subagent, or broker, or otherwise, that the acceptance of this appointment will be understood to be and shall be independent thereof, and as an abrogation and annulling of such relation in every respect, and said party of the second part shall act as agent solely under this appointment and contract.

Either party hereto may terminate this agreement and the appointment hereunder, unless the same be sooner terminated by death of said party of second part, or by mutual consent, at any time during its continuance, by giving to the other party thirty days' notice, in writing, to that effect, and this contract to take effect, April 1st, 1878.

In witness whereof, the said party of first part has hereunto, in duplicate, caused the same to be executed by its president and secretary; and the said party of second part has hereunto, in duplicate, set his hand and seal, this twelfth day of March, 1878.

JOHN E. DE WITT, *President.*

J. P. CARPENTER, *Secretary.*

E. A. WARFIELD. [SEAL.]

Sealed and delivered in the presence of—

ALBERT G. MILTON.

282 And the defendant thereupon offered in evidence a contract between the Union Mutual Life Insurance Company and Robert B. Kendall, dated April 1st, A. D. 1878; to which contract the complainant then and there objected as immaterial; which objection the court then and there overruled; to which ruling the complainant then and there excepted, and the said contract was then read in evidence and is in words and figures as follows:

Form 164.

Union Mutual Life Insurance Co. of Maine.

This agreement, made this first day of April A. D. 1878 by and between the Union Mutual Life Insurance Company of Maine, party of the first part, and Robert B. Kendall party of the second part, witnesseth:

That the said party of the first part hereby agrees to employ the said party of the second part at the annual compensation of twenty-five hundred dollars, payable in semi-monthly installments, on the first and fifteenth of each and every month during the continuance of this agreement.

That the said party of the first part further agrees to pay the necessary traveling expenses actually incurred by the said party of the second part, while actually engaged in the prosecution of the business of said party of the first part, away from his place of residence which for the purpose of this contract is known as Chicago, Illinois.

That the said party of the second part hereby agrees to enter the service of the said party of the first part, and to devote his whole time and energies in advancing the interest of the said party of the first part in such manner as may be directed by the officers of said company.

It is further understood and agreed, that if the said party of the second part has at any time held any relation to this company, as agent or subagent, or broker, or otherwise, that the acceptance of this appointment will be understood to be and shall be independent thereof, and as an abrogation and annulling of such relation in every respect, and said party of second — shall act as attorney and counsellor at law solely under this appointment and contract.

Either party hereto may terminate this agreement and the appointment hereunder, unless the same be sooner terminated by death of said party of second part, or by mutual consent, at any time during its continuance, by giving to the other party thirty days' notice, in writing, to that effect.

In witness whereof, the said party of first part, has hereunto, in duplicate, caused the same to be executed by its president and

secretary ; and the said party of second part has hereunto, in duplicate, set his hand and seal, this first day of April, 1878.

JOHN E. DE WITT, *President.*

J. P. CARPENTER, *Secretary.*

ROBT B. KENDALL.

Sealed and delivered in the presence —

H. HOWARD BENEDICT.

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It is agreed that the letter dated March 21, 1879, from Kendall to the company, may go in by stipulation subject to the same objections as the other exhibits. Said letter was then read in evidence and is in words and figures as follows :

CHICAGO, ILL., *March 21, 1879.*

Union Mutual Life Insurance Company, 158 Tremont St., Boston :

In reply to the president's letter of the 14th inst., calling attention to loan 682, I would say that Mrs. Diversy will agree to settlement on basis proposed some time ago to the company by me and assented to by letter of vice-president, viz: Let her keep 40 acres of her farm and execute quitclaim of the rest; Kerchoff and wife to quitclaim all their property covered by our mortgage.

The old trust deed on the Diversy farm prior to ours to be released, &c., and everything made tight and safe.

Mr. Weckler told me day before yesterday that they would settle that way. The Burroughs case has given me much trouble, owing to Burroughs' delaying policy, but as soon as the Larned matter is settled we can go on with the foreclosure, and I will give Burroughs no rest until the thing is finished.

I am, very respectfully, yours, &c.,

ROBERT B. KENDALL.

And the defendant thereupon offered and read in evidence the original quitclaim deed from Mrs. Kirchoff and husband to the company ; which said deed is in words and figures as follows :

Quitclaim Deed.

This indenture witnesseth that the grantors Julius Kirchoff and Elizabeth Kirchoff his wife, one of the heirs of Michael Diversy, deceased of the city of Chicago, in the county of Cook and State of Illinois, for the consideration of one dollar and other valuable consideration convey and quitclaim to the Union Mutual Life Insurance Company a corporation created and existing under and by virtue of the laws of the State of Maine, all the following-described real estate situate in said county of Cook, to wit: Lots one (1) two (2) three (3) ten (10) eleven (11) and twelve (12) in block four (4) in Knokke and Gardner's subdivision of twenty (20) acres north and adjoining the south thirty (30) acres of the west half of the north-west quarter of section number twenty-eight (28) township forty (40) north, range fourteen (14) east of third principal meridian ; also lot number twenty-six (26) in O. J. Rose's subdivision of the east half of block twenty-eight (28) in the Canal Trustees' subdivision

of west part of section five (5), township thirty-nine (39) north, range fourteen (14) east of the third principal meridian; also lot ten (10) in block sixty-four (64) original town of Chicago; with the three-story brick building situate thereon; also block twelve (12), and the east three and one-tenth ($3\frac{1}{10}$) acres of block three (3) on William Lill and heirs of Michael Diversy's division of the south-west half of the northeast quarter of section twenty-nine (29)
284 township forty (40) north fourteen (14) east of third principal meridian.

Also lot three (3) in the subdivision of the northeast corner of block fifty-three (53) in Kinzie's addition to Chicago.

Also lots number two (2) and four (4) in block number twenty-one (21) in the Canal Trustees' subdivision of the south fraction of section three (3) township thirty-nine (39), north range fourteen (14) east of the third principal meridian hereby releasing and waiving all right under and by virtue of the homestead exemption laws of said State of Illinois.

This conveyance is given and accepted in satisfaction of certain indebtedness of the said Julius Kirchoff and Elizabeth Kirchoff secured by a trust deed of said premises given by the said Julius Kirchoff and Elizabeth Kirchoff his wife and Angela Diversy to Levi D. Boone, trustee, dated the eight-day of May in the year eighteen hundred and seventy-one, and recorded in the recorder's office for the said county of Cook in Book 649 of Deeds page 131.

Dated this fourth (4th) day of September in the year eighteen hundred and seventy-nine.

JULIUS KIRCHOFF.

ELIZABETH KIRCHOFF. [SEAL.]

STATE OF ILLINOIS, }
County of Cook, } ss :

I, Harry Rubens, a notary public in and for said county, in the State aforesaid, do hereby certify that Julius Kirchoff and Elizabeth Kirchoff, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this fifth day of September, A. D. 1879.

[SEAL.]

HARRY RUBENS,
Notary Public.

Endorsed.

STATE OF ILLINOIS, }
Cook County, } ss :

No. 244,146.

Recorded Nov. 8, 1879, at 10 o'clock p. m., Book 902 of Records, page 494.

JAS. W. BROCKWAY, Recorder.

And the defendant thereupon offered and read in evidence the blank quitclaim deed sent by Kendall in his letter of November 1st, 1879, to the defendant company; which said deed is in words and figures as follows:

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Blank Q. C. Deed.

Know all men by these presents that the Union Mutual Life Insurance Company, a corporation existing under and by virtue of the laws of the State of Maine, in consideration of the sum of seven thousand dollars to it paid by Elizabeth Kirchoff wife of Julius Kirchoff of Chicago, in the county of Cook and State of Illinois, the receipt of which sum is hereby acknowledged, doth hereby remise, release, quitclaim and convey unto the said Elizabeth Kirchoff and her heirs and assigns, the following-described land and premises situate in the said city of Chicago, in the county of Cook and State of Illinois, to wit:

Lot number two (2) in block number twenty-one (21) in Canal Trustees' subdivision of south fraction of section three (3) township thirty-nine (39), north range fourteen (14) east of 3rd principal meridian.

To have and to hold all and singular the premises above conveyed to the said Elizabeth Kirchoff and her heirs and assigns to their own use and behoof forever.

In witness whereof the said Union Mutual Life Insurance Company hath caused its corporate seal to be hereunto affixed and these presents to be subscribed by its president duly authorized by vote of the finance committee of the board of directors of said corporation, a certificate of which is hereunto attached this fourth day of September in the year eighteen hundred and seventy-nine.

UNION MUTUAL LIFE INSURANCE
COMPANY,

By ———, *President.*

[L. s.]

COMMONWEALTH OF MASSACHUSETTS, }
Suffolk County. }

I, ———, a notary public in and for the county and Commonwealth aforesaid, do hereby certify that ———, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act and deed as president of the Union Mutual Life Insurance Company and as the act and deed of said company for the uses and purposes therein set forth.

Given under my hand and notarial seal the — day of —, in the year eighteen hundred and —.

[L. s.]

—————.

Extract from Article 9 of the By-Laws of the Union Mutual Life Insurance Company.

The finance committee may authorize the foreclosure of mortgages in any manner provided by the laws of the State or county in which the mortgaged property is situated, and may direct
 286 the sale of any real estate held by the company or in trust for the company; and when they shall direct any such sale of property held by the company the president, and in his absence the vice-president, is authorized to execute the proper instrument of conveyance.

Attest:

[L. S.]

— — —, *Secretary.*

At a meeting of the finance committee of the board of directors of the Union Mutual Life Insurance Company, held at the office of said directors, in the city of Boston, on the — day of —, in the year eighteen hundred and —, the foregoing deed was approved and the president directed to execute, acknowledge, and deliver the same.

Attest:

— — —, *Secretary of the Finance Committee.*

STATE OF —, } ss:
 — County,

No. —.

This instrument was filed for record in the recorder's office of — county aforesaid on the — day of —, A. D. 187—, at — o'clock — m., and recorded in Book — of —, on page —.
 — — —, *Recorder.*

And the said defendant thereupon offered and read in evidence quitclaim deed from Mrs. Diversy to the defendant company, dated July 1st, 1879, acknowledged September 5, 1879, and recorded September 12, 1879; which said deed is in words and figures as follows:

Q. C. Deed.

This indenture made this first day of July in the year of our Lord one thousand eight hundred and eighty-nine between Angela Diversy—widow, of the city of Chicago in the county of Cook and State of Illinois party of the first part and the Union Mutual Life Insurance Company a corporation created and existing under and by virtue of the laws of the State of Maine party of the second part witnesseth:

That the said party of the first part for and in consideration of the sum of one dollar in hand paid by the said party of the second part the receipt whereof is hereby acknowledged, and the said party, of the second part forever released and discharged therefrom, has

granted, bargained, sold, remised, released, conveyed, aliened and confirmed and by these presents doth grant, bargain, sell, remise, release, convey, alien and confirm unto the said party of the second part and to its heirs and assigns forever all the following-described lots, pieces or parcels of land situated in the county of Cook and

State of Illinois and known and described as follows, to wit:

287 The north fifteen (15) acres of the northeast quarter of the southeast quarter and the east half of the northeast quarter of section twenty-eight (28) township forty-two (42) north range thirteen (13) east of third principal meridian, excepting however from this conveyance so much of said east half of northeast quarter of section twenty-eight (28) as is described in a deed from the said Angela Diversy to Jacob Schmidt, dated the twenty-first day of November in the year eighteen hundred and seventy and recorded in the recorder's office for said county of Cook in Book 631, page 32 and also excepting a strip of land six rods wide heretofore conveyed to the Chicago and Milwaukee railroad.

This conveyance is given and accepted in satisfaction of certain indebtedness of the said Angela Diversy secured by a trust deed of said premises given by Julius Kirchoff and Elizabeth Kirchoff his wife, and the said Angela Diversy, to Levi D. Boone, trustee, dated the eighth day of May in the year eighteen hundred and seventy-one and recorded in the recorder's office for the said county of Cook in Book 649 of Deeds, page 131.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents issues and profits thereof; and all the estate, right, title, interest, claim, or demand whatsoever of the said party of the first part either in law or equity of in and to the above-bargained premises, with the hereditaments and appurtenances.

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part and its assigns forever.

And the said Angela Diversy party of the first part for herself and her heirs, executors and administrators does covenant, grant, bargain and agree to and with the said party of the second part and its assigns that at the time of the ensealing and delivery of these presents she is well seized of the premises above conveyed as of a good, sure, perfect, absolute and indefeasible estate of inheritance in in law, in fee-simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants bargains, sales, liens and encumbrances of what kind or nature soever; and the above-bargained premises in the quiet and peaceable possession of the said party of the second part and its assigns against all and every other person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

Except as to taxes and assessments and the trust deed above mentioned.

And the said party of the first part hereby expressly waives and releases any and all right, benefit, privilege, advantage and exemption under or by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise.

288 In witness whereof the said party of the first part has hereunto set her hand and seal the day and year first above written.

ANGELA DIVERSY. [SEAL.]

Signed, sealed, and delivered in the presence of—
— — —

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Adam J. Weckler, a notary public in and for the said county, in the State aforesaid, do hereby certify that Angela Diversy, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed, and delivered the said instrument as her free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this fifth (5th) day of September, A. D. 1879.

[SEAL.]

ADAM J. WECKLER,
Notary Public.

No. 236,548. Filed for record this 12th day of Sept., A. D. 1879, at 9 o'clock a. m.

JAS. W. BROCKWAY, Recorder.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Wiley S. Scribner, recorder of deeds in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office the twelfth day of September, A. D. 1879, as document No. 236,548 and recorded in Book 946 of Records, at page 371.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed my official seal, at Chicago, this ninth day of March, A. D. 1887.

WILEY S. SCRIBNER, Recorder.

And the said defendant offered and read in evidence a deed of release from Levi D. Boone to Angela Diversy, dated June 9, 1879, recorded September 12, 1879; which said deed is in words and figures as follows:

Release Deed.

Know all men by these presents that I, Levi D. Boone, of Chicago, in the county of Cook and State of Illinois the trustee named in a certain trust deed executed by Angela Diversy, Elizabeth Kirchoff and Julius Kirchoff dated the eight- day of May A. D. 1871 and recorded in the recorder's office for the county of Cook in the State of Illinois in Book 649 of Deeds, page 131, in consideration of one dollar to me paid by the said Angela Diversy, the receipt whereof is hereby acknowledged, do hereby remise, release, and quitclaim unto the said Angela Diversy all the right title and interest derived by said trust deed in and to the following-described land and premises to wit:

The northwest quarter of the southeast quarter of section twenty-eight (28) township forty-two (42) north range, thirteen (13) east of the third principal meridian and situate lying and being in the county of Cook and State of Illinois.

In witness whereof I hereunto set my hand and seal this ninth day of June A. D. 1879.

LEVI D. BOONE, *Trustee*. [SEAL.]

STATE OF ILLINOIS, } ss:
Cook County, }

I, Robert B. Kendall, a notary public in and for the said county, in the State aforesaid, do hereby certify that Levi D. Boone, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this fifth day of [SEAL.] September, in the year eighteen hundred and seventy-nine.
ROBT B. KENDALL.

No. 236,550. Filed for record September 12, A. D. 1879, 9 o'clock a. m.

JAS. W. BROCKWAY, *Recorder*.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Wiley S. Scribner, recorder of deeds in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office the twelfth day of September, A. D. 1879, as document No. 236,550, and recorded in Book 929 of Records, at page 97.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Chicago, this ninth day of March, A. D. 1887.

WILEY S. SCRIBNER, *Recorder*.

Mr. GROSSCUP: I believe it appears in the evidence that all the Kirchoff property was appraised, and that the Rees appraisalment

of the homestead was \$7,500 and of the Tower Place lot \$2,500. If not, that may be understood.

The COURT: I understood it to be a fact.

290 And thereupon the witness JULIUS KIRCHOFF was recalled by complainant, and, being examined in chief by Mr. Harbert, testified as follows:

Q. You said in your testimony that your wife borrowed \$60,000. Please state who used that money.

A. We took the money on the business at 81 Michigan avenue.

Q. What business—your business?

A. Yes, where I was a partner. There was other brothers—three brothers—and Mrs. Kinney; and the second time we only received about \$44,000; the other was commission, and we took it on sixty days or something like that; I don't know.

Mr. GROSSCUP: What is that?

A. We took first \$60,000.00 on ninety days' time, and there was a great discount about it; and as we had plenty of money in the business we thought we could make it by ninety days—that we could collect quick; and my brother asked me one day whether I could help him with \$25,000.00, and I said, "We have got plenty of money standing out; why don't you go and collect?"

Mr. HARBERT: Well, never mind; answer this question: Did you use individually all the money that you got out of this loan?

Q. We put it right in, the same day—in the bank on the corner of La Salle and Lake streets.

The COURT: To the credit of the firm?

A. To the credit of the firm. They said they wanted \$25,000.00, and I said, "You might as well have it."

Mr. HARBERT: Have you ever paid it back to your wife?

A. Well, she never saw a cent of it nor did I; my wife never saw a cent of it or neither I.

Cross-examination.

By Mr. GROSSCUP:

Q. Were you a member of that firm?

A. Yes, sir.

Q. Was your wife a member of that firm?

A. No, sir; no member. I even take a mortgage on my house, and after ninety days we took this from Boone from the Union Mutual; we didn't take it originally from him.

Q. Who was the firm composed of?

A. Julius Kirchoff, Brothers and Company.

Q. Who was the company?

A. Well, that was the firm, Julius Kirchoff and three brothers—Gustav, Frederick, and August—and John Kenney; he used to be my partner when we were in the distilling business, so we called that the company.

Q. Was there anybody else in the company?

A. No, sir; we five.

Q. Was your wife in the company?

A. No, sir; she even did not take a mortgage on it, which she could have taken.

291 The COURT: Gentlemen, there is a letter containing a certain proposition contained in Kendall's letter, which Mr. Kendall says he showed, or it was made known to Mr. Kirchoff. Was he asked about that? Does it appear in his testimony?

Mr. HERBERT: I will ask him.

Q. Did ever anybody tender back to you the quitclaim deed which you had executed to the company?

A. Well, I can't remember so well about that. I know there was talk, but I said, "I will stick to my old contract that I have made to give him a quitclaim deed — take the homestead. I don't know whether he has offered any, but I wanted my deed from the company. If he offered it to me I said I wanted my deed.

Q. That is the deed that he had sent to the company?

A. On that consideration we only give them the quitclaim deed, to get out of it, or else we would never have given it, because I had talked with Mr. De Witt myself.

Q. You gave him the quitclaim deed to send off?

A. Yes, sir; to the Union Mutual Life Insurance Company.

Q. Your and your wife did?

A. Yes, sir.

Q. Now, did he ever offer that quitclaim back to you?

A. Well, I cannot remember so very well; I remember there was some talk about it, but I said it was settled.

Q. Did you ever see that deed again?

A. No, sir; never. I never seen it again; I never saw it again; never.

And the above and foregoing is all the testimony and evidence adduced by said parties on the hearing of said cause.

Given under my hand and seal this 10th day of Sept., A. D. 1887.

M. F. TULEY, [SEAL.]

Judge Cir. Ct., Ck C'ty, Ills.

And on the same day, to wit, the 3d day of October, A. D. 1887, there was filed in said court a certain appeal bond, which is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, Elizabeth Kirchoff and Benjamin F. Jacobs, of the county of Cook and State of Illinois, are held and firmly bound unto the Union Mutual Life Insurance Company of the State of Maine in the penal sum of three hundred (300) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 3d day of September, A. D. 1887.

The condition of the above obligation is such that whereas
 292 the said Union Mutual Life Insurance Company did, on the
 twelfth day of July, A. D. 1887, in the circuit court of Cook
 county, in the State aforesaid, and of the June term thereof, A. D.
 1887, obtain a decree against the above-bounden Elizabeth Kirchoff
 dismissing her certain bill, theretofore filed in said court against
 said Union Mutual Life Insurance Company, for want of equity
 and decreeing that said Union Mutual Life Insurance Company
 recover from her its costs in that behalf expended, from which said
 decree of the said circuit court of Cook county the said Elizabeth
 Kirchoff has prayed for and obtained an appeal to the supreme
 court of said State :

Now, therefore, if the said Elizabeth Kirchoff shall duly prosecute
 her said appeal with effect and, moreover, pay the amount of the
 costs, interest, and damage rendered and to be rendered against her
 in case the said decree shall be affirmed in said supreme court, then
 the above obligation to be void ; otherwise to remain in full force
 and virtue.

ELIZABETH KIRCHOFF. [SEAL.]
 BENJAMIN F. JACOBS. [SEAL.]

Approved this 10th day of Sept., 1887.

M. F. TULEY,
Judge Cir. Ct., C'k G'ty, Ills.

STATE OF ILLINOIS, }
 Cook County, } ss :

I, Henry Best, clerk of the circuit court of Cook county and the
 keeper of the records and files thereof, in the State aforesaid, do
 hereby certify the above and foregoing to be a true, perfect, and
 complete transcript of a certain certificate of evidence and appeal
 bond in a certain cause lately pending in said court, on the chancery
 side thereof, between Elizabeth Kirchoff, complainant, and Union
 Mutual Life Insurance Company, defendant.

In witness whereof I have hereunto set my hand
 [COURT SEAL.] and affixed the seal of said court, at Chicago, in
 said county, this 10th day of October, 1887.

HENRY BEST, *Clerk.*

At a supreme court begun and held at Ottawa on Tuesday, the
 sixth day of March, in the year of our Lord one thousand eight
 hundred and eighty-eight, within and for northern grand division
 of the State of Illinois.

Present: Benj. R. Sheldon, chief justice; John M. Scott, justice;
 John H. Mulkey, justice; Simeon P. Shope, justice; John Schol-
 field, justice; Alfred M. Craig, justice; Benj. D. Magruder, justice;
 George Hunt, attorney general; Lawrence Morrissey, sheriff; Al-
 fred H. Taylor, clerk.

Be it remembered, to wit, on the 16th day of June, A. D. 1888, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

293	ELIZABETH KIRCHOFF vs. UNION MUTUAL LIFE INSURANCE COMPANY.	}	No. 1715. Appeal from Cook —.
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And now, on this day, the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, find that the said appeal is not well taken.

Therefore it is considered by the court that the appeal herein be and the same is hence dismissed, and that *procedendo* be awarded, with leave to said appellant to withdraw the record herein filed.

And it is further considered by the court that the said appellee recover of and from the said appellant its costs by it in this behalf expended, and that it have execution therefor.

I, Alfred H. Taylor, clerk of the supreme court of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of the said supreme court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Ottawa, this 15th day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

A. H. TAYLOR,
Clerk of the Supreme Court.

In the Appellate Court of Illinois, First District, October Term,
A. D. 1889.

ELIZABETH KIRCHOFF, Plaintiff in Error, vs. UNION MUTUAL LIFE INSURANCE COMPANY, Defendant in Error.	}	Assignment of Errors.
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And now comes the said Elizabeth Kirchoff, plaintiff in error, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The court erred in not entering a decree in conformity with the prayer of the bill.
2. The court erred in dismissing complainant's bill for want of equity.
3. The court erred in refusing leave to file the proposed amended bill.
4. The court erred in refusing to grant complainant any relief whatever.

5. The court erred in admitting improper evidence over complainant's objections.

6. The court erred in not setting aside and cancelling the quitclaim deed from Elizabeth Kirchoff and Julius Kirchoff to the Union Mutual Life Insurance Company mentioned in the bill.

294 7. The court erred in not allowing complainant to redeem lot two (2), mentioned in the bill, upon paying the amount at which it had been appraised.

8. The court erred in not allowing complainant to redeem the two lots in question upon paying the amount at which they had been appraised.

9. The court erred in not allowing complainant to redeem the two lots in question upon equitable terms.

10. The court erred in not decreeing that the title acquired by the defendant under the deed from complainant and her husband and under the foreclosure mentioned in the bill as to the two lots in question was held by it in trust for complainant.

11. The court erred in that his finding and decree are contrary to the evidence in the case.

By reason whereof plaintiff prays that said decree may be reversed, etc.

W. S. HARBERT,
GEO. R. DALEY,

Solicitors for Plaintiff in Error.

In the Appellate Court, First District, Illinois.

ELIZABETH KIRCHOFF, Plaintiff in Error,	} No. 3359. Error to Cook Circuit.
vs.	
UNION MUTUAL LIFE INSURANCE COMPANY, Defendant in Error.	

I, John J. Healey, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached and marked A & B is the original transcript of record filed in said appellate court on the 3 day of May, A. D. 1889, by said Elizabeth Kirchoff.

[COURT SEAL.] In testimony whereof I have hereunto set my hand and seal of said court, at Chicago, this 14th day of February, A. D. 1890.

JNO. J. HEALY,
Clerk of the Appellate Court, First District, Illinois.

At a term of the appellate court begun and held in Chicago on Tuesday, the first day of October, in the year of our Lord one thousand eight hundred and eighty-nine, within and for the first district of the State of Illinois.

Present: Hon. Joseph E. Gary, presiding justice;

“ “ Thomas A. Moran, justice;

“ “ Gwynn Garnett, justice; John J. Healy, clerk;

C. R. Matson, sheriff.

Be it remembered that on the 2nd day of October, A. D. 1889, it being one of the days of said October term, A. D. 1889, certain proceedings were had in said court and entered of record in words and figures following, to wit:

This cause having this day been reached in the call of the docket and no one appearing to argue the same, *and* the court, not being fully advised in the premises, doth order that said cause be taken under advisement on briefs filed herein.

ELIZABETH KIRCHOFF, Plaintiff in Error, }
vs. } No. 3359.
 UNION MUTUAL LIFE INSURANCE COM- } Error to Cook Circuit.
 pany of the State of Maine, Defendant }
 in Error. }

And it is further considered by the court that the said Elizabeth Kirchoff, plaintiff in error, recover of and from the said Union Mutual Life Insurance Company, defendant in error, her costs by her in this behalf expended, to be taxed, and that she have execution therefor.

And afterwards, on the 11th day of December, A. D. 1889, the following order was made and entered of record in said cause, to wit :

297 The condition of the above obligation is such that whereas the said Union Mutual Life Insurance Company, on the 12th day of July, 1887, in the circuit court of Cook county, in the State aforesaid, and of the June term thereof, A. D. 1887 (the bill of the complainant, Elizabeth Kirchoff, having been dismissed), did recover a judgment against the said Elizabeth Kirchoff for costs of suit, to which said order of dismissal and judgment of the circuit court of Cook county the said Elizabeth Kirchoff sued out a writ of error from the appellate court within and for the first district of said State; and whereas the said appellate court did, on the 28th day of October, A. D. 1889, and at the October term thereof, A. D. 1889, reverse and remand with directions the judgment of the circuit court aforesaid, and did afterwards, to wit, on the 11th day of December, 1889, make an order denying the petition of the said Union Mutual Life Insurance Company for a rehearing, and did render judgment against the above-bounden Union Mutual Life Insurance Company for costs of suit, from which order of reversal and remanding with directions and judgment of the said appellate court the said Union Mutual Life Insurance Company has prayed and obtained an appeal to the supreme court of the State of Illinois:

Now, therefore, if the said Union Mutual Life Insurance Company shall duly prosecute its said appeal with effect and, moreover, pay the amount of the judgment, costs, interest, and damages rendered and to be rendered against the said Union Mutual Life Insurance Company in case the said judgment shall be affirmed in said supreme court, then the above obligation to be void; otherwise to remain in full force and virtue.

[Seal of Corporation.]

UNION MUTUAL LIFE INSURANCE COMPANY,
By ARTHUR L. BATES, *Secretary*.
DAVID G. HAMILTON. [SEAL.]

I, John J. Healy, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order and judgment, all orders, proceedings, and appeal bond of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 6th day of January, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.]

JOHN J. HEALY,
Clerk of the Appellate Court of the First Dist.

Assignment of Errors.

1. The appellate court erred in that its findings and judgment are contrary to the evidence.
2. The appellate court erred in that its findings and judgment are contrary to the law.

298 3. The appellate court erred in reversing and remanding the decree of the circuit court of Cook county.

4. The appellate court erred in not affirming the decree of the circuit court of Cook county.

5. The appellate court erred in holding that the appellee was entitled to redeem.

6. The appellate court erred in holding that appellee was entitled to redeem upon the payment of ten thousand dollars and interest thereon at six per cent. instead of eight per cent., as stipulated in the mortgage debt.

7. The appellate court erred in holding that appellee was entitled to redeem on the payment of ten thousand dollars and interest, instead of seventeen thousand dollars, the amount for which the lots were bid in at the sale.

8. The appellate court erred in admitting, as competent, evidence impeaching the recital of the quitclaim deed of appellee, to the effect that it was given in satisfaction of the indebtedness.

9. The appellate court erred in permitting Julius Kirchhoff to testify in behalf of his wife, the appellee.

10. The appellate court erred in reversing the decree of the circuit court and remanding with special instructions, instead of remanding generally.

Wherefore appellant prays that said judgment of appellate court may be reversed.

GROSSCUP & WEAN,
Solicitors for Appellant.

P. S. GROSSCUP, *Of Counsel.*

Be it remembered, to wit, on the eleventh day of March, A. D. 1890, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

UNION MUTUAL LIFE INSURANCE COMPANY	}	Appeal from Appellate Court of Illinois, First District.
vs. ELIZABETH KIRCHOFF.		

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that appellant hath filed a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

299 Be it remembered, to wit, on the twelfth day of June, A. D. 1890, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

UNION MUTUAL LIFE INSURANCE COMPANY	} Appeal from Appellate Court of Illinois, First District.
<i>vs.</i> ELIZABETH KIRCHOFF.	

And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected, as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error:

Therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the court that the said appellee recover of and from the said appellant her costs by her in this behalf expended, and that she have execution therefor.

And upon the entering of said order the opinion of the court rendered in said cause was filed in the office of the clerk in the words and figures following, viz:

Opinion by Craig, J.

This was a bill in equity brought by Elizabeth Kerchoff on the 12th day of June, 1882, against the Union Mutual Life Insurance Company to redeem lots 2 and 4, block 21, in Canal Trustees' subdivision of a certain quarter section of land in Cook county, to which the company acquired title under a quitclaim deed from complainant and her husband and under certain foreclosure proceedings in which she, her husband, and others were defendants.

The record is quite voluminous, but the facts, briefly stated, are substantially as follows: On the 8th day of May, 1871, Julius Kerchoff, complainant's husband, borrowed of the insurance company \$60,000, and to secure the payment he and Elizabeth Kerchoff and her mother, Angela Diversey, executed their joint note; Kerchoff and wife executed a *decree* of trust on all real estate they owned, including the two lots, their homestead. Mrs. Diversey also executed a deed of trust on lands owned by her to secure the loan.

In 1877, default having been made in the payment of the money, negotiations were commenced with a view of a renewal of the loan on long time at a reduced rate of interest.

These negotiations did not prove successful, and an effort was then made for a settlement by having the mortgagors surrender all or most of the property in payment of the debt. In the meantime judgment was rendered against Mrs. Di-

versey on the note by confession, and in July, 1878, bills were instituted in the circuit court of the United States to foreclose the two trust deeds.

In the trust deed executed by Mrs. Diversey a part of the premises belonging to her were incorrectly described, and in the bill to foreclose the company sought to correct the error.

Mrs. Diversey put in an answer denying any mistake in the description, and set up other matters of defense. On Jan. 1st, 1879, Kendall, the attorney of the insurance company in Chicago, wrote the company that in his opinion an offer to Mrs. Diversey to let her retain forty acres of the land would induce her to give the company a deed of the balance of the property; that Kerchoff would surrender all his property and make an arrangement to buy back his homestead at a liberal price, but "I do not dare to settle with him without settling the whole case," as Mrs. Diversey's matters may be complicated by any settlement with Kerchoff. To this the company replied: If settlement can be made of all complications in and with quitclaims from all parties, we will consent to let her keep 40 acres. A short time after this, about the 9th day of June, 1879, a settlement was made, and in Sept., 1879, Mrs. Diversey conveyed to the company all the land named in the trust deed which she owned, except the 40 acres, and that was released to her. At the same time complainant and her husband by quitclaim deed conveyed to the company all the land named in the trust deed they had executed to the company. Thus far there seems to be no substantial dispute between the parties, but in reference to what arrangement was made between the complainant and the insurance company under which she quitclaimed all the property described in the deed of trust to the company and allowed a subsequent decree of foreclosure to be entered the parties do not agree.

The complainant insists that during the preceding negotiations it was agreed, in consideration of her quitclaim deed, the appellant would reconvey to her two lots heretofore described, one of which was then occupied as her homestead, the other cornering upon it; that the price at which the reconveyance should take place was their valuation at a previous appraisalment by James H. Rees, namely, seventy-five hundred and twenty-five hundred dollars respectively, and that complainant was to execute in payment therefor her notes for ten thousand dollars, extending over a period of ten years, bearing interest at six per cent. and secured by a mortgage upon the two lots.

The ins. company, on the contrary, contends that no such agreement was ever concluded, and that if it was complainant is not, under all the facts, entitled either to redemption or a decree for specific performance.

During the time the negotiations were in progress which resulted in the settlement under consideration Edwin A. Warfield was the financial agent of the Union Mutual Life Insurance Company at Chicago, and Robert B. Kendall was the attorney of the company, in charge of its business. After the settlement had been concluded it turned out that certain encumbrances existed against

some of the property which were subsequent to the trust deed, but which would take priority to the quitclaim deed executed by complainant and her husband. It therefore became necessary, in order to obtain a perfect title, to go on with the foreclosure proceedings, which was done. A decree was rendered, the property was sold, and upon the expiration of the time of redemption a master's deed was executed. In order to establish an agreement under which the complainant was entitled to redeem, reliance is placed mainly upon the evidence of three witnesses, Julius Kirchoff, Edwin Warfield, and Rob't B. Kendall. The first-named witness testified that he had authority from his wife to settle the matter for her and in all he did he acted as her agent; that the company filed a bill to foreclose the mortgage in July, 1878. He further testified:

About the time the bill was filed to foreclose the trust deed I made a contract with the defendant looking toward a settlement. They wanted a quitclaim on the consideration of the two lots known as the homestead, and we gave a quitclaim deed in 1879, we agreeing to pay them for the homestead whatever the appraisal should be. The corner lot was appraised at \$7,500, and the other at \$2,500; total, \$10,000; to be paid in ten years—\$1,000 a year. They agreed to it, and we gave them a quitclaim deed. Some time after that they tried to foreclose. I asked Mr. Warfield what they meant. He said, It is exactly the same as we made the contract and is all right; it is better to have it foreclosed to keep the mortgage safe for us. I saw Mr. Kendall, the lawyer of the company. He said there were some judgments against that property, and to make it safer they had to foreclose, and that I need not be afraid; it would be all right. They told me they made out the deeds and sent them to their main office. When they came back during that year they were to be delivered to us on payment of \$1,000. It took some time on account of the foreclosure. It was at six per cent. interest.

Mr. Warfield first saw me in relation to getting a quitclaim before the foreclosure proceedings were commenced. We were to relinquish everything except the homestead; give them a quitclaim and keep the homestead—the two lots. We were to give a quitclaim deed to everything, including the homestead lots, and redeem the homestead at the appraised value—\$7,500 for one lot and \$2,500 for the other. They were to make a deed out and send it to the company, and upon its return deliver it to us at any time during the year, and we were to pay \$1,000 and \$1,000 a year thereafter until \$10,000 was paid, with six per cent. interest.

I agreed with the company's agent that Mr. Rees should make the appraisal. Warfield, Kendall, and myself went with him. He appraised the corner lot at \$7,500 and the other at \$2,500; total, \$10,000. The terms of payment were ten years' time, \$1,000 the first year, or upon the delivery of the deed whenever the deed was ready, and \$1,000 each year thereafter until \$10,000 had been paid, with six per cent. interest.

Warfield testified: There was an interview at which a proposition was made for the Kirchoffs to make and deliver a quitclaim deed to the company covering all the property embraced in the trust deed, the company to reconvey to the Kirchoffs

their homestead. I believe the proposition embraced the lot cornering on the homestead; the conveyance to be made at an appraised value to be placed on the property by James H. Rees. The appraisal was made. The terms, as I now remember them, were \$1,000 cash on delivery of the deed from the company, and \$1,000 a year until the property was paid for, together with interest at 6 per cent. on deferred payments. Subsequently Mr. Kirchoff came with a carriage and took Mr. Rees, Mr. Kendall, and myself to look at the property for the purpose of making the valuation. As near as I can remember, the price fixed was \$7,500 for the homestead and \$2,500 for the Pine Street lot, making \$10,000.

The witness also testified that the proposition came from the president, vice-president, and chairman of the finance committee while some one of them was in Chicago. He thought Mr. De Witt, president of the company, made it. The witness also testified: "Personally, as agent of the company, I did not make the agreement heretofore testified to. What I did was to submit to the Kirchoffs propositions coming from the company."

Kendall testified that he commenced the foreclosure suit in July, 1878. There had been negotiations before that in regard to a settlement. Kirchoff then made some arrangement through Warfield, the financial agent of the company, to redeem his homestead. The witness further testified:

I understood it was agreed that Kerchoff could redeem or repurchase from the company, at a price to be fixed by appraisers to be selected by the Kirchoffs and the company. These negotiations were not conducted by me. I was only advised of them, as they were going on, by Mr. Warfield and by conversations with Kirchoff. James H. Rees was agreed upon as the appraiser, and Mr. Warfield, Mr. Kirchoff, and myself went with him one day and visited all the city property. My recollection is that the price he placed on the homestead lots was \$7,000 for one and \$2,500 for the other. Kirchoff said he would undertake to pay that if the company would make him a title to it and release him from further liability on his note and trust deed. There was a general understanding that he could buy the property back on those terms, the whole amount to be divided into ten equal yearly payments, at six or four per cent. interest—I don't remember which.

We have not set out all that the three witnesses testified to, as their evidence is quite voluminous. We have, however, given the main features of their evidence relating to the making of the agreement relied upon. If these witnesses are not mistaken, it is apparent that Kirchoff, as agent for the complainant, made a contract with Warfield, the financial agent of the Union Mutual Life Insurance Company, that he and his wife should convey to the company by quitclaim deed all of the property embraced in their deed of trust, and that complainant was to redeem or receive a reconveyance of the

two lots known as the homestead property, for which she was
303 to pay the company the amount at which the lots should be appraised by James H. Reese, payable \$1,000 cash down and \$1,000 annually, at six per cent. interest. The contract as detailed

by Kirchhoff is plain and definite; it contains nothing uncertain or ambiguous. He says it was made in 1878, soon after the filing of the bill. We have no doubt, when all the evidence is considered, that he is correct on this point—that is, the terms of the contract, as to the property embraced in the deed of trust he had executed, were then agreed upon and understood between him and Warfield; but the contract was not fully consummated until an agreement was reached with Mrs. Diversey as to the property embraced in the deed of trust she had executed. The object seems to have been to not close up any contract with Kerchoff until a contract was made with Mrs. Diversey. This seems apparent from the fact that Kerchoff and wife executed and delivered their deed to the company on the same day Mrs. Diversey delivered her deed. It may be that all of the evidence of Kerchoff is not entirely consistent and harmonious, but his evidence as to the terms and conditions of the contract is not only harmonious but is consistent with what was done looking in the direction of a consummation of the contract. The lands were appraised as agreed by the person named in the agreement. The complainant executed and delivered their deed to the company as provided in the contract. The foreclosure proceedings were suffered to go on without any objection from the Kirchoffs, no defense being made by them. The company accepted the deed of the Kirchoffs, under which they parted with all right of redemption in and to the lands described therein, and it nowhere appears that any consideration existed for that conveyance except the agreement relied upon here to redeem the two lots upon payment of a stipulated sum. Why should the Kirchoffs part with their rights of redemption unless something was to be secured in return? But it is said Warfield's and Kendall's evidence, so far as it tends to establish a contract, is contradicted by their letters and acts after the alleged contract was claimed to have been made. Kendall, the attorney, took no part in making the contract, but, as he testified, understood from the financial agent of the company and from Kirchhoff that an agreement had been made—he knew what it was. Warfield testified that personally as agent he did not make a contract; but he says he had propositions from the company which were submitted and accepted. He gives the terms of the contract substantially as given by Kirchhoff. Now, if it be true that in the letters and correspondence of the financial agent and attorney with the company may be found statements not entirely in harmony with their evidence, such facts could not invalidate the contract after it was made as disclosed by the evidence of Warfield and Kerchoff. Such facts may somewhat weaken their evidence, but that is all.

As has been seen, Warfield was acting as financial agent of the company; he was entrusted with the management of the company's loans and securities and real estate in Chicago, and when acting within the scope of the apparent power the company will be bound by his acts. *Union Mutual Life Ins. Co. vs. White*, 106 Ill., 67.

304 But, aside from this, it is apparent from the letters of the company that Warfield had authority to make the contract relied upon. In Jan., 1879, Kendall wrote the company that he

would have no difficulty in settling with Kerchoff, but that he dare not settle with him without settling the whole case. In reply to this Sharp, the vice-president, wrote Kendall to confer with Warfield in regard to a settlement, saying that the company would undoubtedly be satisfied with any plan which should have their united endorsement. While this was after the alleged agreement was made, it shows the authority with which the agent was clothed. But, independent of this, the company could not accept and hold the deed executed by Kirchoff under the agreement made with the agent and at the same time repudiate the agreement. The acceptance of the deed will be regarded as a ratification of the agreement made by the agent under which it was executed.

T. W. & W. R. R. Co. vs. Elliott, 76 Ill., 67.

Ewell Evans on Agency, 65.

But it is said no redemption can be allowed except of the whole premises and upon the payment of the whole debt in money. When a tract of land has been sold for a specified amount of money in payment of a mortgage and the mortgagor makes application to redeem, in the absence of a contract between mortgagor and mortgagee to the contrary the mortgagor would be required to redeem the entire tract sold and pay the whole of the mortgage indebtedness. *Jones on Mort.*, sec. 107-1072. But this doctrine has no application whatever to a case where the mortgagor and mortgagee have entered into an agreement under which a redemption may be made. The mortgagee may by contract extend the period allowed by law for redemption and a court of equity will enforce such an agreement. *Schoonhoven vs. Pratt*, 25 Ill., 457; *Pensoneau vs. Pulliam*, 47 Ill., 58. And we perceive no reason why the mortgagee may not accept money or land in satisfaction of a part of the mortgage debt and enter into a valid agreement to give the mortgagor an extension of time to pay a specified sum of money to redeem a part of the premises. No reason is perceived why an agreement to apportion the mortgage debt may not be made and enforced and made. *Dexter vs. Arnold*, 1 Sumn., 109; *Howard vs. Gresham*, 2 Ga., 347; *Danforth vs. Smith*, 23 Vt., 247; *Mutual Mills Ins. Co. vs. Gordon*, 121 Ill., 366.

The quitclaim deed from the Kirchoffs to the company dated Sept. 4th, 1879, contains the following clause:

"This conveyance is given and accepted in satisfaction of certain indebtedness of the said Julius Kirchoff and Elizabeth Kirchoff, secured by a trust deed on said premises given by the said Julius Kirchoff and Elizabeth Kirchoff, his wife, and Angela Diversey to Levi D. Boone, trustee, dated the 8th day of May, in the year 1871.

And it is claimed that the complainant is estopped by this clause in the deed from setting up the agreement to redeem. The con-

sideration named in a deed has never been regarded as con-

305 clusive on the parties to the instrument; parol evidence is

not admissible to vary or contradict the terms of a deed or

other written contract, yet such evidence may be introduced to show the true consideration of a deed, although it may be different from

that named in the instrument. *Booth vs. Haynes*, 54 Ill., 363; *Primm vs. Legg*, 67 Ill., 500. The clause referred to is a mere recitation that the consideration for the deed was a certain thing which could not be conclusive, and if not conclusive, it could not work an estoppel. It is also denied that complainant's failure to assert the alleged agreement in the foreclosure proceedings is a bar to its assertion here that the proceedings in the foreclosure are conclusive. We are unable to concur in this position. It was a part of the arrangement under which the complainant was to obtain the two lots in controversy that a decree of foreclosure should be entered and that the premises should be sold under such decree. The decree was rendered and the sale made by consent for the purpose of clearing the different tracts of land mentioned in the quitclaim deed from certain incumbrances. The decree was not adverse to the interest of complainant, but in harmony with her interest; she is not attacking the decree, but claiming the enforcement of an agreement under which it was rendered, and in our judgment there is no ground for holding that the rights of complainant were cut off or in any manner impaired by the decree. As has been said before, this record is quite voluminous and there is much that has not been referred to, as a reference to everything contained in the record would extend this opinion to an unusual length. We have said nothing in reference to the argument that this is a bill for specific performance, and hence falling within the statute of frauds, as we have not regarded it a bill of that character. The substance of the agreement was that complainant was to have the two lots in question, notwithstanding her deed in Sept., 1879, and notwithstanding the decree of foreclosure and sale thereunder, upon the payment of \$1,000 and the execution of her notes secured by a mortgage on the premises for the balance, payable \$1,000 each year for nine years, with six per cent. interest. The witnesses in speaking of the agreement—some of them speak of it as one to redeem, while others speak of it as one to repurchase. Kirchhoff says it was to get the homestead back. Warfield said that the Kirchoffs were to be allowed to buy back their homestead. Kendall, in his evidence, says they were to be allowed to redeem or repurchase; but this is immaterial; the form of the transaction in a court of equity is not to be regarded. The Kirchoffs conveyed away their right of redemption to a number of tracts of land and in consideration they were to have the two lots free and clear from the deed of trust upon payment of a certain sum of money. The deed conveying the right of redemption was accepted by the company and it has been retained by it, and equity demands that it should comply with the contract under which the deed was received. It is claimed in the argument the release of complainant and her husband from personal liability on the indebtedness formed the consideration
306 for the quitclaim deed they executed to the company. A letter written by Kendall Sept. 18th, 1877, to the company would seem to be a complete answer to this position. In that letter he informed the company that there was no personal liability existing against either; that Kirchhoff had been through bankruptcy,

and hence was not personally liable for the debt, and that Mrs. Kirchoff, having signed the note prior to the act of 1874 relating to contracts of married women, was under the disability of coverture and could not be held personally liable. From this statement it appears that the company knew long before the quitclaim deed was executed that the Kirchoffs were not personally liable for the debt and knowing that fact it is not at all likely that a supposed release from a liability that had no existence formed a part of the consideration for the deed. We think the judgment of the appellate court was right and it will be affirmed.

Affirmed.

At a supreme court begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand eight hundred and ninety, within and for the northern grand division of the State of Illinois.

Present: John Scholfield, chief justice; Alfred M. Craig, justice; Simeon P. Shope, justice; Benj. D. Magruder, justice; Joseph M. Bailey, justice; David J. Baker, justice; Jacob W. Wilkin, justice; George Hunt, attorney general; Lawrence Morrissey, sheriff; Alfred H. Taylor, clerk.

Be it remembered, to wit, on the thirteenth day of October, A. D. 1890, the same being one of the days of the term of court aforesaid, the following proceedings were, by said court, had and entered of record, to wit:

UNION MUTUAL LIFE INSURANCE	} Appeal from <i>from</i> Appellate
COMPANY	
vs.	
ELIZABETH KIRCHOFF.	Court of Illinois, First Dis-
	trict. Petition for Rehear-
	ing.

Now, on this day, this cause comes on to be heard upon the petition of the appellant for a rehearing herein, and, the court being now duly advised in the premises, it is considered by the court that said petition for a rehearing be overruled and denied; and it is further considered by the court that said petitioner pay the costs and charges herein taxed.

To the Hon. John M. Harlan, associate justice of the Supreme Court of the United States:

Your petitioner, The Union Mutual Life Insurance Company of Portland, Maine, a corporation duly organized and doing business under the laws of the State of Maine, respectfully represents that on the 12th day of June, A. D. 1890, the supreme court of the State of Illinois entered a decree and judgment in a cause wherein The Union Mutual Life Insurance Company, your petitioner, was appellant and Elizabeth Kirchoff was appellee; that the said supreme court of the State of Illinois is the highest court of the State of Illinois in which a decision in said suit can be had, and that the said decree and judgment so rendered was against your petitioner and was a final decree and judgment in said case.

Your petitioner further represents that by the record of said cause, pages 440-454, it is shown that your petitioner, on the 20th day of October, A. D. 1880, became the purchaser of two certain lots known as lots two and four, in block twenty-one (21), &c., at a judicial sale of the circuit court of the United States for the northern district of Illinois, conducted through one of the masters in chancery of said court, in a cause then pending for the foreclosure of a mortgage, wherein your petitioner was the complainant and the said Elizabeth Kirchoff and others were the defendants; that on the 24th day of February, A. D. 1881, said master's sale was by the said circuit court of the United States confirmed, and that on the 21st day of January, A. D. 1882, the time for redemption under the statutes of Illinois having expired, deeds were made by the said master to your petitioner for the said lots, and that on the same day an order was entered in said cause in said circuit court of the United States approving said master's deeds, whereby your petitioner acquired a title and right through, under, and by virtue of the authority of the courts of the United States.

Your petitioner further represents that on the 12th day of June, A. D. 1882, the said Elizabeth Kirchoff, appellee in the said cause in the supreme court of the State of Illinois, filed in the circuit court of said State of Illinois, being one of the courts of said State, her bill in chancery, wherein she in substance claimed both that she had a contract for a reconveyance of said lots and that the said deeds for said premises issued to your petitioner under and by virtue of the authority of the United States circuit court aforesaid, and in the manner aforesaid were invalid and ineffective as conferring title upon your petitioner or foreclosing her title therein, for the pretended reason that long prior thereto, to wit, in August, A. D. 1878, she, as mortgagor, entered into an agreement with your petitioner, as mortgagee, by the terms of which the said foreclosure proceedings then pending were to be regarded as having no force and effect in cutting off her right of redemption to said lots or in conferring title upon your petitioner, but that said right of redemption, notwithstanding said judicial proceedings, was to continue and extend through the period of ten years instead of twelve months, and the amount of redemption was to be ten thousand dollars (\$10,000.00) instead of seventeen thousand dollars (\$17,000.00), the amount of said purchase, and praying in said bill for a decree of specific performance or a decree allowing her to redeem the said two lots upon the payment of the said ten thousand dollars (\$10,000.00) in the manner designated, one thousand dollars (\$1,000.00) each year for ten years, notwithstanding the said judicial sale and the deeds issued thereunder by the United States circuit court aforesaid and notwithstanding the fact that the time for redemption had expired, and that the amount of redemption was upwards of seventeen thousand dollars (\$17,000.00), all of which is shown by her bill (Record, pp. 3-12), her amended bill (Rec., pp. 28-37), and proposed amended bill (Rec., pp. 38-48).

Your petitioner further represents that on the 28th day of October, A. D. 1881, and prior to the issuance of deeds to your petitioner
40—155

by the said master of the United States circuit court and the entry of an order in said court approving the same, James R. Page, a receiver previously appointed in said foreclosure suit, filed his petition in said circuit court of the United States for the northern district of Illinois in said foreclosure cause, asking for the possession of said premises from said Julius Kirchoff, husband of the said Elizabeth Kirchoff; that thereupon the said Elizabeth Kirchoff, through her said husband, Julius Kirchoff, as is admitted in the bill (Record, pp. 9, 10), resisted said application for a writ of assistance, setting forth in substance the above pretended agreement between your petitioner and said Elizabeth Kirchoff, and that upon the hearing of said application and answer, to wit, on the 16th day of November, A. D. 1881, the said court issued its writ of assistance to the marshal, thereby overruling said answer and directing him to put the receiver in said foreclosure suit in possession of the said premises, the solicitors for your petitioner supporting said application of the receiver and disregarding the pretended agreement with the said Elizabeth Kirchoff, as is set forth in said bill (Record, pp. 9, 10).

Your petitioner further represents that upon the hearing in said circuit court and in the appeals thereon in the appellate court and the said supreme court of the State of Illinois your petitioner resisted the prayer of the said bill upon the following grounds:

First. That no such agreement as alleged in the bill aforesaid had been made.

Second. That the pretended agreement, so far as it might be made the ground for specific performance or the establishment of a trust, was obnoxious to the statute of frauds.

Third. That the title acquired through the judicial authority of the courts of the United States could not thus be set aside, modified, or impaired.

Fourth. That the said State courts had no jurisdiction to thus set aside, modify, or impair a title acquired under judicial authority of the courts of the United States.

Fifth. That the claim set up in the bill was *res adjudicata*, in that it had been expressly passed upon on the hearing of the application for the writ of assistance and the resistance thereto by the said Elizabeth Kirchoff through her husband, Julius Kirchoff.

Your petitioner further represents that upon the said hearing in the circuit court of the State of Illinois said bill of Elizabeth Kirchoff was dismissed for want of equity; that thereupon she appealed said cause to the appellate court for the first district of Illinois, where the decree of the circuit court aforesaid was reversed and the said cause was ordered to be remanded to the said circuit court, with directions to enter an order or decree allowing the said Elizabeth Kirchoff to redeem, as prayed in her bill, and to cause an accounting to be taken between your petitioner and the said Elizabeth Kirchoff as between mortgagor and mortgagee of the
309 said premises; all of which appears by the record of this cause and the authenticated copy of the opinion of said appellate court; that thereupon your petitioner appealed from the said decree and judgment of the appellate court to the supreme

court of the State aforesaid, where the said decree and directions of the appellate court were affirmed, the said appellate court and supreme court expressly declining to consider the statute of frauds for the reason that they regarded the bill as one to redeem from the foreclosure sale and not one to enforce specifically a contract or trust.

Your petitioner further represents that under the practice of the said State of Illinois, as adjudicated by the courts thereof, the said circuit court of the State, to which said cause has been remanded, can do nothing further now in said cause than to enter a decree in conformity with the decree and opinion of the said appellate court, to wit, the decree permitting the said Elizabeth Kirchoff to redeem from the said deeds upon the payment of ten thousand dollars (\$10,000.00), with interest thereon at the rate of six per cent. per annum, and as affected by an accounting between your petitioner and the said Elizabeth Kirchoff as between mortgagor and mortgagee of said premises.

Wherefore your petitioner represents that the said decree and judgment of the supreme court of the State of Illinois draws in question the validity of an authority exercised under the United States, and that the decision thereof has been against the validity of that authority, and that the said decree and judgment of the supreme court of the State of Illinois aforesaid decides against a title, right, and privilege of your petitioner claimed under the authorities exercised under the United States, and that said judgment and decree draws in question the validity of an authority exercised under the State of Illinois on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of the validity of such authority, and that the said judgment and decree fails to give full faith, credit, and effect to the judicial proceedings of the United States courts, in that it overrules and disregards the express acts of the said court aforesaid foreclosing the equity of redemption and the express adjudication of said court upon the claim made by the said Elizabeth Kirchoff, and that in the said decree and judgment there is error to the damage of your petitioner.

Wherefore your petitioner prays for the allowance of a writ of error and such other process as will enable your petitioner to obtain a review of the case and a correction of the errors alleged by the Supreme Court of the United States.

Respectfully submitted.

P. S. GROSSCUP,
FRANK L. WEAN,

Att'ys for Union Mutual Life Insurance Company.

Dated at Chicago, Illinois, this 3rd day of June, A. D. 1892.

310 Allowed, but not to operate as a supersedeas. Bond for costs in the penalty of \$500 to be executed, with surety to be approved.

June 4th, 1892.

JOHN M. HARLAN,
Asso. Justice Sup. Ct. U. S.

(Endorsed :) Filed June 10, 1892. A. H. Taylor, clerk.

Know all men by these presents that we, Union Mutual Life Insurance Company, a corporation existing under and by virtue of the laws of the State of Maine, and John Wain, of Chicago, Ills., are held and firmly bound unto Elizabeth Kirchoff in the full and just sum of five hundred dollars, to be paid to the said Elizabeth Kirchoff, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a term of the supreme court of the State of Illinois for the northern grand division, in a suit depending in said court between Union Mutual Life Insurance Company, appellant, and Elizabeth Kirchoff, appellee, a judgment was rendered against the said Union Mutual Life Insurance Company, and the said Union Mutual Life Insurance Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Elizabeth Kirchoff, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Union Mutual Life Insurance Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

UNION MUTUAL LIFE INSURANCE	
COMPANY,	[SEAL.]
By JOHN E. DE WITT, <i>President.</i>	
JOHN WAIN.	[SEAL.]

Sealed and delivered in presence of—
— — —

Approved by—

JOHN M. HARLAN,
Associate Justice Sup. Ct. U. S.

Mr. Wain is abundant security.

H. W. B.

(Endorsed :) Filed June 10, 1892. A. H. Taylor, clerk.

311 *Copy of Opinion of Appellate Court, Filed in Supreme Court in Compliance with Rule 29 of Supreme Court.*

312 ELIZABETH KIRCHOFF }
vs. }
UNION MUTUAL LIFE INS. CO. }

Opinion of Judge Gary.

The facts in this case, as established by a preponderance of the evidence, are that in May, 1871, the insurance company loaned \$60,000 to the complainant and plaintiff in error and her husband Julius Kirchoff, and her mother Angela Diversy, upon their note secured by a trust deed conveying many parcels of land belonging to them in severalty, among which were lots 2 and 4 in block 21 of the Canal Trustees' subdivision of the S. fractional $\frac{1}{4}$, sec. 3, T. 39, N., R. 14, E. of the 3d P. M., which were the property of the complainant.

In 1878 there was default in payment. Reasons not very clearly shown by the record led to negotiations which resulted in the conveyance by the mother of all her lands included in the deed, except forty acres which the company released to her, and by the complainant and her husband of all their lands included in the deed, which conveyances the company accepted in satisfaction of this debt. But as part of the transaction it was agreed that the complainant might purchase from the company those lots for \$10,000, the terms for the payment of which are involved in considerable uncertainty, except that they were to extend over a period, probably of nine years, but which certainly have now elapsed, and the rate of interest was to be six per cent.

She filed her bill to have the benefit of this agreement. The bill was dismissed upon the hearing. As was said in *Sargent v. Howe*, 22 Ill., 148, the deed of trust in this case "only differs from a mortgage with power of sale in its being executed to a third person instead of the creditor;" and therefore the dealings between the parties are within the rule applicable to mortgagors and mortgagees, "that the courts look upon their transactions with jealousy." 1 Jones on Mortgages, 711.

The evidence as to the agreement is by the testimony of Julius Kirchoff, E. A. Warfield the general agent, and R. B. Kendall, the attorney of the company, and it was made between Julius Kirchoff, acting for the complainant, and Warfield, with some participation by Kendall, acting for the company.

The authority of Warfield to act for the company under circumstances, as shown by this record, has been affirmed by the Supreme Court in the cases of *this Company v. White*, 106 Ill., 69, and *Slee*, 110 Ill., 30. The testimony of Julius Kirchoff is much weakened by the inconsistency of his conduct afterwards, with the agreement, but it is so corroborated by Warfield and Kendall that there is sufficient proof of the agreement.

Before the conveyance to the company, the company had com-

menced foreclosure proceedings, in which they sought to reform the description of a part of the lands of Mrs. Diversy. She had answered, contesting it, and alleging a defense, which, if successful, would have invalidated most, if not all, of the papers she had executed. The company understood, whether correctly or not is immaterial, that they could make no adjustment with her without the assent of the Kirchoffs. There were therefore considerations to induce the company to make the agreement, and that they did make it, is satisfactorily proved, and they have had from it all the benefit they proposed to obtain by it. The foreclosure proceedings went on after the conveyances, to cut off the intervening title, but with the agreement that it should not affect the agreement as to the lots described.

314 The company obtained deeds under the foreclosure in January, 1882, but refused to perform the agreement made by Warfield. As to the effect of this agreement, the rule in equity, "once a mortgage always a mortgage," applies.

As was said in *Eunor v. Thompson*, 46 Ill., 215, "When the mortgagor has conveyed the mortgaged premises to the mortgagee, it only operates as a bar to the equity of redemption, when it clearly and unequivocally appears that both parties so understood and intended it should."

Here the contrary as to the two lots, clearly and unequivocally appears. And it does not affect the complainant's right to redeem those lots, that as to the residue of the mortgaged property there is no redemption, and that she proposes to pay but a small part of the original debt, when by the operation of the law upon the acts, or by the agreement of the parties, the debt has been apportioned, and a part of it made the sole burden upon a part of the incumbered property, that part may be redeemed by paying that part of the debt apportioned to the part redeemed. *Meacham v. Steele*, 93 Ill., 135; *Mutual Mills Ins. Co. v. Gordon*, 121 Ill., 366.

The complainant filed her bill to redeem in June, 1882. The lots she was to redeem and the principal sum she was to pay, as well as the rate of interest, are definitely fixed by the agreement.

The time at which the interest was to begin, and the amounts and times of payment of the installments, are left uncertain. But this is not a bill for specific performance. It is an appeal to a court of equity by the complainant that she may have her property restored to her upon the terms that she shall discharge the burden upon it, fixed in amount by agreement; and which, if that agreement
315 had been executed and performed, would have been discharged in the time that has elapsed.

She is now entitled to the benefit of that agreement, upon the terms that she, within a short time after the amount is ascertained, pay it.

The decree is therefore reversed and the cause remanded to the circuit court with directions to that court to have an account taken of the amount due the company, crediting them with the principal sum of \$10,000 and interest thereon at six per cent. from September 10, 1879, the day of the delivery of the deed of the complainant and

her husband to the company, together with whatever the company has paid for taxes, assessments, insurance, repairs, and other expenses upon the property, so far as the same may be found to have been reasonably necessary, and charging them with the rents and profits which they have, or by ordinary care and diligence ought to have received from the property, interest to be allowed upon the disbursements if not repaid by the rents and profits, (but there is to be no compounding of interest) and when the amount due the company is ascertained, to enter a decree; that upon the payment of that amount with interest thereon within ninety days thereafter, the company convey to her, and that in that event she recover her costs.

But if she do not so pay, the bill will be dismissed at her costs. *Bremer v. Canal & Dock Co.*, 127 Ill., 464.

Reversed and remanded.

Garnet, J., does not concur in the conclusion reached.

316 At a supreme court begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand eight hundred and ninety-three, within and for the northern grand division of the State of Illinois.

Present: David J. Baker, chief justice; Alfred M. Craig, justice; Simeon P. Shope, justice; Benj. D. Magruder, justice; Joseph M. Bailey, justice; Jacob W. Wilkin, justice; Jesse J. Phillips, justice; Maurice T. Moloney, attorney general; William W. Taylor, sheriff; Alfred H. Taylor, clerk.

Be it remembered that afterwards, to wit, on the fourth day of October, A. D. 1893, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the circuit court of Cook county and of the appellate court of Illinois, first district; which said transcripts are in the words and figures following, to wit:

317 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, {
Cook County, } ss:

Pleas before the Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 16th day) of January, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

Present: Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, State of Illinois; Jacob J. Kern, State's attorney; James H. Gilbert, sheriff.

Attest: FRANK J. GAULTER, *Clerk*.

Be it remembered that heretofore, to wit, on the 12th day of June, A. D. 1882, Elizabeth Kirchoff, by W. S. Harbert, her solicitor, filed

in said court a certain bill of complaint, and thereupon there issued out of said court and under the seal thereof the people's writ of summons, directed to the sheriff of Cook county to execute; which said bill and said summons, together with the return of the sheriff thereon endorsed, are in the words and figures following, to wit:

STATE OF ILLINOIS, }
County of Cook, } ^{ss:}

In the Circuit Court of the said County of Cook.

To the honorable the judges of the county of Cook, in chancery sitting:

318 Humbly complaining, sheweth unto your honors your oratrix, Elizabeth Kirchoff, wife of Julius Kirchoff, of Chicago, in said county, that on or about the eighth day of May, A. D. 1871, your oratrix, together with her said husband, bound of the Union Mutual Life Insurance Company, a corporation subsisting under the laws of the State of Maine, the sum of sixty thousand dollars, and to secure the payment thereof, with interest thereon, executed their promissory note, jointly and severally with one Angela Diversey, the mother of your oratrix, for said sum of money, payable to said company, and also a trust deed (to Levi D. Boone as trustee) of a large amount of real estate in said county belonging to your oratrix, including, among other lots and parcels, the following-described lots of land situate in Chicago, in said county, and known as lots two (2) and four (4), in block twenty-one (21), of the Canal Trustees' subdivision of the south fractional quarter section three (3), township thirty-nine (39) north, range fourteen (14) east of third principal meridian.

That afterwards, to wit, some time during the year eighteen hundred and seventy-eight, default having been made in the payment of said money, the said insurance company threatened to institute proceedings for the foreclosure of said trust deed and a sale of the real estate of your oratrix therein described.

That thereupon your oratrix, through her said husband as her agent, offered said company to release and quitclaim to said company all and singular her land and premises in said trust deed described, provided said company would allow your oratrix to

319 redeem from said trust deed the said two lots of land herein before specifically described (one of which said two lots was then, at that time, occupied by your oratrix as a homestead) upon payment of whatever sum of money the said lots, with the improvements thereon, should be valued by an appraiser, to be agreed upon by said company and your oratrix, and upon such terms of payment as the said company were at or about that time offering to purchase, of its real estate, to wit, in ten equal annual payments or installments, with interest until paid, at the rate of six per cent. per annum, and to secure the payment of such installments by a mortgage upon each of said lots; and provided also that the said company should take the land in trust deed described, be-

longing to your oratrix, in full satisfaction of any claim of said company against your oratrix and her said husband on account of said promissory note and trust deed.

That the said company accepted said offer and agreed to allow such redemption of said two lots by your oratrix upon the terms proposed and for the consideration aforesaid.

That thereupon said company, in pursuance of said agreement, designated one James H. Rees, of said Chicago, as a proper and competent person to appraise the said two lots of land, and your oratrix, through her said husband, assented to the employment of said Rees for such purpose.

That thereupon the said Rees, together with one E. A. Warfield, the financial agent of said company, and R. B. Kendall, the attorney for said company, and your oratrix's said husband, visited said lots, your oratrix contributing to the expenses of said appraisal, and the said Rees, after having viewed the said two lots, appraised the same as follows, to wit, said two (2) lots, with the improvements thereon, at the sum of seven thousand five hundred dollars (\$7,500) and said lot four (4) at the sum of two thousand five hundred dollars, of which appraisals the said Rees made report in writing to said company, and of which the said company notified your oratrix, which said report, as your oratrix as your oratrix is informed and believes, is now in the possession of said company and to which your oratrix prays leave to refer.

That thereafter, upon examination of the title to said lots, it appeared that there were certain intervening liens and incumbrances upon the same, created after the execution of said trust deed and prior to the agreement hereinbefore set forth for such redemption by your oratrix, and it was thereupon represented to your oratrix by said company, through its attorney, that it would be necessary to foreclose said trust deed in order to make good title in said company to said lots of land before it could take mortgages thereof for said instruments of redemption leaving, and it was thereupon agreed by and between the said company and your oratrix that the agreement for such redemption should not be executed until after the title had been perfected in said company by said foreclosure proceedings, but should be held in abeyance until such foreclosure proceedings should be completed and the title to said lots become vested in said company discharged of such incumbrances, etc., but that in the meantime your oratrix should execute and deliver to said company her deed of release and quitclaim, as agreed upon, and should interpose no defense to such foreclosure proceedings.

That afterwards, pursuant to the agreement aforesaid, your oratrix and her said husband executed, acknowledged, and delivered to said company a deed of release and quitclaim of all and singular the land and premises belonging to your oratrix, described in said trust deed, including the said two lots hereinbefore specifically described, in and by which said deed it was in effect stipulated by your oratrix that said deed should not be construed to effect the right of said company to foreclose said trust deed;

which said deed, as your oratrix is informed and believes, has since then been recorded in the recorder's office of said county, and to the record thereof your oratrix prays leave to refer if it be necessary so to do.

And your oratrix further shows unto your honors that the said company, in pursuance of said agreement, afterwards prosecuted its suit in the circuit court of the United States for the northern district of Illinois for the foreclosure of said trust deed and obtained a decree of foreclosure and sale, under and by virtue of which said decree said lots were afterwards, to wit, on the 20th day of October, A. D. 1880, offered for sale by the master in chancery of said court and were sold and struck off to said company as the highest bidder at said sale, as follows, to wit, said lot two (2) for the sum of nine thousand dollars (\$9,000), and said lot four (4) for the sum of eight thousand dollars (\$8,000), and that deeds of said lots have since been issued and delivered to said company by the said master in chancery and have been recorded in said recorder's office.

That in said suit for foreclosure the said company procured the appointment of a receiver of all the land and premises involved in said suit, your oratrix making no defense to said suit, and that afterwards said receiver demanded possession of said lot two (2), which was occupied by your oratrix and her husband as a homestead, and applied to said court for a writ of assistance to put him, said receiver, in possession thereof.

That thereupon your oratrix, through her said husband, resisted said application for said writ of assistance and set up in defence to the application of said receiver an answer setting forth in substance the aforesaid agreement between said company and your oratrix, but said company, through its solicitors employed in said suit, supported the application of said receiver and wholly disregarded its agreement with your oratrix and procured the order of said court for the issuance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead.

And your oratrix well hoped that upon the execution and delivery of said master's deeds of said lots to said company (which said deeds were issued on or about the twenty-first day of January, A. D. 1882) the said company would in good faith keep and perform its said agreement with your oratrix and convey said two lots to your oratrix upon the terms aforesaid.

But, and so it is, the said Union Mutual Life Insurance Company utterly refuses to carry out its said agreement with your oratrix and falsely and fraudulently claim- to hold and own said two lots of land in fee-simple absolute, free and discharged of any equitable interest therein on the part of your oratrix, and seeks to deprive your oratrix of her rights in the premises and refuses to convey to your oratrix the said lots of land or either of them upon the terms agreed upon, as aforesaid, and gives out and pretends that no such agreement was ever made or entered into between said company and your oratrix, whereas your oratrix charges the contrary to be the truth, and that she is justly entitled

to a conveyance of said lots from said company upon the terms aforesaid.

And your oratrix further shows unto your honors that she has in good faith kept and performed her part of said agreement for the redemption of said lots, so far as she has been able to do, by the delivery of her said deed of release and quitclaim to said company in full faith, and claimed that the said agreement would be kept and performed by said company, and that she has always *had* and is now ready and willing to keep and perform the whole of said agreement on her part to be performed, but has been prevented by said company from so doing.

All which actions, doings, and pretenses of said company are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your oratrix in the premises.

In further consideration whereof and forasmuch as your oratrix is remediless in the premises at and by the strict rules of the common law and is relievable only in a court of equity, where such things are properly cognizable and relievable—

To the end, therefore, that the said Union Mutual Life Insurance Company may true answer make to all and singular the premises

(but not under oath, the benefit whereof is expressly waived
324 by your oratrix) and may be compelled by the decree of

this court specifically to perform the said agreement with your oratrix and convey to her the said two lots of land hereinbefore specifically described, your oratrix being ready and willing and hereby offering specifically to perform the said agreement in all things on her part, and that your oratrix may have such other and further relief in the premises as the equities of her case may require and as to your honors shall seem meet—

May it please your honors to grant unto your oratrix the people's writ of subpoena, directed to the said Union Mutual Life Insurance Company, commanding said company, at a certain day and under a certain penalty, to appear before your honors in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order and decree therein as to your honors shall seem meet; and your oratrix will ever pray, etc.

ELIZABETH KIRCHOFF.

W. S. HARBERT,

Solicitor for Complainant.

Summons.

STATE OF ILLINOIS, }
County of Cook, } ss :

The People of the State of Illinois to the sheriff of said county,
Greeting :

We command you that you summon the Union Mutual Life Insurance Company, if it shall be found in your county, personally to be and appear before the circuit court of Cook county on the
325 first day of the term thereof to be holden at the court-house in Chicago, in said Cook county, on the third Monday of

July, A. D. 1882, to answer unto Elizabeth Kirchoff in her certain bill of complaint filed in said court on the chancery side thereof.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Jacob Gross, clerk of said court, and the seal [SEAL.] thereof, at Chicago, in said county, this 12th day of June, A. D. 1882.

JACOB GROSS, *Clerk.*

Endorsement: P'd 1.00 Served this writ on the within-named Union Mutual Life Insurance Company by delivering a copy of this writ to Leonard Swett, attorney for said company, this 13th day of June, 1882; the president of said company not found in my county. O. L. Mann, sheriff, by J. N. Burke, deputy.

And thereupon, on the 22nd day of June, A. D. 1892, there was filed in said court a certain demurrer, which is in the words and figures following, to wit:

In the Circuit Court of Cook County, June Term, A. D. 1882.

ELIZABETH KIRCHOFF, Complainant,	} In Chancery.
vs.	
UNION MUTUAL LIFE INSURANCE COMPANY, Defendant.	

326 *The Demurrer of Union Mutual Life Insurance Company, Defendant, to the Bill of Complaint of Elizabeth Kirchoff, the Above-named Plaintiff.*

STATE OF ILLINOIS, } ss:
Cook County,

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer sheweth that the said complainant hath not in and by her said bill made or stated such a case as doth or ought to entitle her to any such discovery or relief as is thereby sought and prayed for from or against this defendant, in that the said bill does not show a valid contract concerning the said land described in said bill of complaint and one which can be enforced neither in law or in a court of equity.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demand the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

SWETT & HASKELL,
Solicitors for Defendant.

And afterwards, to wit, on the 19th day of February, A. D. 1883, the following proceedings were had and entered of record in said court, to wit:

327

Order, Feb. 19, '83.

ELIZABETH KIRCHOFF
vs.
UNION MUTUAL LIFE INSURANCE COMPANY. } 41522 Bill.

This day came the said parties, by their respective solicitors, and thereupon came on to be heard the demurrer of the defendant to the complainant's bill of complaint in this cause, which was argued by counsel, and the court, being now fully advised in the premises, doth overrule the said demurrer and doth grant the defendant twenty days from date in which to answer herein.

And afterwards, to wit, on the 9th day of March, A. D. 1883, there was filed in said court a certain answer, which is in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court, Cook County.

ELIZABETH KIRCHOFF
ats.
THE UNION MUTUAL LIFE INSURANCE COM- } In Chancery. Feb-
PANY. } ruary Term, 1883.

The Answer of The Union Mutual Life Insurance Company, Defendant, to the Bill of Complaint of Elizabeth Kirchoff, Complainant.

This defendant, reserving to itself all rights of exceptions to the said bill of complaint, for answer thereto says it admits that
328 on or about the 8th day of May, 1871, said complainant, together with her husband, borrowed of this defendant the sum of sixty thousand dollars, and to secure the payment thereof executed the note and trust deed, as in said bill set forth. This defendant, further answering, says that it denies that said complainant, through her husband or any one else, offered said company to release and quitclaim to defendant the lands and premises in said trust deed described, provided said defendant would allow said complainant to redeem the two lots in said bill described from said trust deed upon the payment of whatever sum of money the said lots, with the improvements therein, should be valued at by an appraiser to be agreed upon by the parties and upon the terms in said bill set forth or any other terms; and said defendant says that it denies that it accepted said pretended offer or any offer from said complainant, and denies that it agreed to allow such redemption of said two lots by said complainant upon any terms or for any consideration whatever. Said defendant denies that in pursuance of the

agreement set forth in said bill it designated one James H. Rees as a proper person to appraise said lands; and said defendant has no information that said Rees, Warfield, and Kendall made any appraisal of said lots, as in said bill set forth, or that said complainant contributed to the expenses of such appraisal, and therefore denies the same. Said defendant admits that there were incumbrances and liens on said lots other than the lien of said defendant and subsequent thereto, but defendant denies that it represented to the said complainant that it would be necessary to foreclose said trust deed before it could take a mortgage thereof for said pretended installment of redemption money, as in said answer set forth; and said defendant denies that it at any time agreed with said complainant that the agreement for redemption, as averred in said bill, should not be performed until after the title to said lots had been perfected in said defendant; and said defendant denies that it agreed with said complainant that said agreement for redemption, as averred in said bill, should be held in abeyance until foreclosure proceedings should be completed and the title to said lots vested in said defendant discharged of the incumbrances; and defendant denies that said complainant agreed that she would not interpose any defense to said foreclosure proceeding.

Said defendant denies that said complainant executed and delivered to said defendant any deed of release and quitclaim to said premises in pursuance of the agreement for redemption set forth in said bill.

Said defendant admits that it prosecuted its suit for foreclosure in the circuit court of the United States and obtained a decree and purchased said property, as in said bill set forth, but denies that the same was done in pursuance of any agreement with said complainant. Said defendant admits that a receiver was appointed in said suit and obtained possession of said lots, but has no knowledge that the said defendant's solicitor in said suit procured the order compelling said complainant to vacate the said lots and therefore denies the same.

This defendant admits that it refused to convey said lots to said complainant, but denies that it seeks to deprive said complainant of any right belonging to her, and denies that its claim to said lots is false or fraudulent. Said defendant denies that said complainant has in good faith kept and performed her part of said alleged agreement for redemption of said lots, and denies that the delivery of said deed of quitclaim and releases by complainant to said defendant was upon the faith and reliance that the said alleged agreement of redemption would be kept and performed by said defendant, and denies that said complainant has heretofore or is now ready to perform her part of said alleged agreement; and said defendant says that said complainant has at no time made any tender of any amount whatever to said defendant.

And this defendant, further answering, says that by the statute of frauds and perjuries of the State of Illinois it is, among other things, provided that no action shall be brought whereby to charge any person upon any contract for the sale of lands, tenements, or heredit-

aments or any interest in or concerning them unless the agreement upon which such action should be brought or some memorandum or note in writing shall be signed by said party to be charged therewith or some other person by him lawfully aothorized; and this defendant says that the pretended agreement set forth in the bill of complaint was not reduced to writing or signed by this defendant or by any one authorized by it so to do; and this defendant insists upon said statute and claims the same benefit as if he had pleaded the same; and this defendant, further answering, denies that the complainant is entitled to the relief or any part thereof in said bill of complaint demanded, and prays the same advantage of
 331 this answer as if it had pleaded or demurred to said bill of complaint, and prays to be dismissed with *his* reasonable costs and charges in this behalf wrongfully sustained.

SWETT AND HASKELL,
Sol'rs for Def't.

And thereupon, on the 17th day of March, A. D. 1883, there was filed in said court a certain replication, which is in the words and figures following, to wit:

STATE OF ILLINOIS, }
Cook County, } ss:

In the Circuit Court of Cook County, February Term.

ELIZABETH KIRCHOFF

vs.

THE UNION MUTUAL LIFE INSURANCE COMPANY.

} In Chancery.

The Replication of Elizabeth Kirchoff to the Answer of The Union Mutual Life Insurance Company, Defendant.

This repliant, saving and reserving unto *himself* all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says—

That she will aver and prove her said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual
 332 in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matter- and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by her said bill she has already prayed.

W. S. HARBERT,

Sol'r for Complainant.

And thereupon, on the 21st day of March and the 26th day of June, A. D. 1883, the following proceedings were had and entered of record in said court, to wit:

Order, Mar. 21, '83.

ELIZABETH KIRCHOFF	}	41522, 973. Bill.
<i>vs.</i>		
UNION MUTUAL LIFE INSURANCE COMPANY.		

On motion of solicitor for the complainant, it is ordered that this cause be, and it is hereby, referred to Arno Voss, Esq., one of the masters in chancery of this court, to take proof of all the material allegations in the said bill contained and report the same to this court with all convenient speed.

Order, June 26, '83.

ELIZABETH KIRCHOFF	}	41522, 973. Bill.
<i>vs.</i>		
UNION MUTUAL LIFE INSURANCE COMPANY.		

And now, on this day, this cause coming on to be heard on the motion of the complainant to require defendant and its solicitors, Swett and Haskell, to produce, upon the taking of testimony
 333 herein before Arno Voss, Esq., one of the masters in chancery of this court, the books and writings hereafter referred to, and it appearing to the court that such books and writings are material as evidence and pertinent to the issues in this cause, and it further appearing that good and sufficient cause has been shown for such application and order, that reasonable notice of such application has been given, and that such books and writings are in the possession or under the control of said defendant and its said solicitors, and the court, being fully advised in the premises, doth order, adjudge, and require the said defendant and its solicitors, Swett and Haskell, to produce before Arno Voss, Esq., one of the masters in chancery of this court, for use by complainant upon the taking of testimony upon the reference heretofore made herein, the following books and writings, namely :

A certain appraisement in writing made by one James H. Rees, being a valuation by said Rees of the property and premises in the bill described, which appraisement bears date the latter part of 1878.

Certain letters and letter-press copies of letters written by the agent of said defendant at Chicago and mailed by said agents to the home office or principal place of business of said company. Said letters relate to the loan by said company to the complainant, or relate to the premises securing such loan, and relating to business transactions between said company and complainant. The letters above embrace all correspondence between the Chicago office and the home office of the defendant relating to the Kirchoff loan and matters growing out thereof and pertaining to the transactions set out in the bill herein, &c.

334 A certain deed sent by the officers or agents of said company at Chicago to the home office (not executed), being a conveyance of the property in the bill described to the complainant.

And afterwards, to wit, on the 10th day of March, A. D. 1887, certain proceedings were had and entered of record and a certain amended bill was filed in said court; which said proceedings and said amended bill are in the words and figures following, to wit:

Order, Mar. 10, '87.

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

} 41522. Bill.

On motion of solicitor for the complainant, it is ordered that leave be, and it hereby is, granted the complainant to amend her bill of complaint instant.

And, on motion of solicitor for defendants, it is further ordered that the answer on file stand the answer of the defendant to the amended bill.

And, on motion of solicitor, the replication on file to stand to the answer to said amended bill.

STATE OF ILLINOIS, }
County of Cook, } *ss.*

In the Circuit Court of the said County of Cook.

To the honorable the judges of the circuit court of said county, in chancery sitting:

335 Humbly complaining, sheweth unto your honors your oratrix, Elizabeth Kirchoff, wife of Julius Kirchoff, of Chicago, in said county, that on or about the eighth day of May, 1871, your oratrix, together with her said husband and her mother, Angela Diversey, borrowed of the Union Mutual Life Insurance Company, a corporation subsisting under the laws of the State of Maine, the sum of sixty thousand (60,000) dollars, and to secure the payment thereof, with interest thereon, executed their promissory note, jointly and severally, for said sum of money, payable to said company, and also a trust deed (to Levi D. Boone, as trustee), of a large amount of real estate in said county belonging to your oratrix, including, among other lots and parcels, the following-described lots of land situated in Chicago, in said county, and known as lots two (2) and four (4), in block twenty-one (21) of the Canal Trustees' subdivision of the south fractional quarter section three (3), township 39 north, range fourteen (14) east, of the third principal merid-an.

That afterwards, to wit, some time during the year eighteen hundred and seventy-eight (1878), default having been made in the payment of said money, the said insurance company instituted proceedings for the foreclosure of said trust deed and a sale of the real estate of your oratrix therein described.

That thereupon your oratrix, through her said husband as her agent, offered said company to release and quitclaim to said company all and singular her land and premises in said trust deed described, provided said company would allow your oratrix to

336 redeem from said trust deed *that* said two lots of land hereinbefore specifically described, one of which said two lots was at that time occupied by your oratrix as a homestead, upon payment of whatever sum of money the said lots, with the improvements thereon, should be valued by an appraiser to be agreed upon by said company and your oratrix, and upon such terms of payment as the said company were at or about that time offering to purchasers of its real estate, to wit, in ten equal annual payments or installments, with interest until paid, at the rate of six per cent. per annum, and to secure the payment of such installments by a mortgage or trust deed upon said lots; and provided also that said company should take the land in said trust deed described belonging to your oratrix in full satisfaction of any claim of said company against your oratrix and her said husband on account of said promissory note and trust deed.

That the said company accepted said offer and agreed to allow such redemption of said two lots by your oratrix upon the terms proposed and for the consideration aforesaid.

That thereupon said company, in pursuance of said agreements, designated one James H. Reese, of said city of Chicago, as a proper and competent person to appraise the said two lots of land, and your oratrix, through her said husband, assented to the employment of said Rees for such purposes.

That thereupon the said Rees, together with one E. A. Warfield, the financial agent of said company, and R. B. Kendall, the attorney for said company, and your oratrix's said husband, visited said lots, your oratrix contributing to the expense of said appraisal, and the said Rees, after having received the said two
337 lots, appraised the same as follows, to wit, said lot two (2), with the improvements thereon, at the sum of seven thousand five hundred dollars, \$7,500, and said lot four (4), at the sum of two thousand five hundred dollars, of which appraisal the said Rees made report in writing to said company and of which the said company notified your said oratrix; which said report, as your oratrix is informed and believes, is now in the possession of said company, and to which your oratrix prays leave to refer.

That afterwards, pursuant to the agreement aforesaid, your oratrix and her said husband executed, acknowledged, and delivered to said company a deed of release and quitclaim of all and singular the land and premises belonging to your oratrix described in said trust deed, including the said two lots hereinbefore specifically described; which said deed, as your oratrix is informed and believes, has since then been recorded in the recorder's office of said county, and to said deed or the record thereof your oratrix prays leave to refer if it be necessary so to do.

That thereafter, upon examination of the title to said lots, it appeared that there were certain intervening liens and incumbrances

upon the same created after the execution of said trust deed and prior to the agreement hereinbefore set forth for such redemption by your oratrix, and it was thereupon represented to your oratrix by said company, through its attorney, that it would be necessary to foreclose trust deed in order to make good title in said
 338 company to said lots of land before it could take mortgage thereof for said installments of redemption money, and it was thereupon agreed by and between the said company and your oratrix that the agreement for said redemption should not be further performed until after the title had been perfected in said company by said foreclosure proceedings, but the further execution thereof should be held in *advance* until after such foreclosure proceedings should be completed and the title to said lots became perfected in said company, discharged of such incumbrances, &c., and that in the meantime your oratrix should interpose no defense to such foreclosure proceedings.

And your oratrix further shows unto your honors that the said company, in pursuance of said agreement, afterward continued the prosecution of its suit in the circuit court of the United States for the northern district of Illinois for the foreclosure of said trust deed and obtained a decree of foreclosure and sale, under and by virtue of which said decree said lots were afterward, to wit, on the 20th day of October, A. D. 1880, offered for sale by the master in chancery of said court, and were sold and struck off to said company at said sale as follows, to wit, said lot two (2) for the sum of nine thousand dollars (\$9,000), and said lot four (4) for the sum of eight thousand dollars (\$8,000), and that deeds of said lots have since been issued and delivered to said company by the said master in chancery and have been recorded in the said recorder's office.

That in said suit for foreclosure the said company procured the appointment of a receiver of all the land and premises involved in said suit, your oratrix making no defense to said
 339 suit, and that on, to wit, the 16th day of November, 1881, said receiver demanded possession of said — two (2), which was occupied by your oratrix and her husband as a homestead, and applied to said court for a writ of assistance to put him, said receiver, in possession thereof.

That thereupon your oratrix, through her said husband, resisted said application for said writ of assistance and set up a defence to the application of said receiver an answer setting forth in substance the aforesaid agreement between said company and your oratrix; but said company, through its solicitors employed in said suit, supported the application of said receiver and wholly disregarded its agreement with your oratrix and procured order of said court for the assistance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead.

And your oratrix well hoped that upon the execution and delivery of said master's deeds of said lots to said company (which said deeds were issued on or about the twenty-first day of January, A. D. 1882) the said company would in good faith keep and perform its

said agreement with your oratrix and convey said two lots to your oratrix upon the terms aforesaid.

But now so it is the said Union Mutual Life Insurance Company utterly refuses to carry out its said agreement with your oratrix and falsely and fraudulently claims to hold and own said two lots of land in fee-simple absolute, free and discharged of any equitable
340 interest therein on the part of your oratrix, and seek- to deprive your oratrix of her rights in the premises, and refuses to convey to your oratrix the said lots of land or either of them upon the terms agreed upon, as aforesaid, and gives out and pretends that no such agreement was ever made or entered into between said company and your oratrix, when as your oratrix charges the contrary to be the truth, and that she is justly entitled to redemption of said lots and a conveyance from said company upon the terms aforesaid.

And your oratrix further shows unto your honors that she has in good faith kept and performed her part of said agreement for the redemption of said lots, so far as she has been able to do, by the delivering of her said deed of release and quitclaim to said company, and has refrained from interposing any defence to said foreclosure proceedings in full faith and reliance that the said agreement would be kept and performed by said company, and that she has always been and is now ready and willing to keep and perform the whole of said agreement on her part to be performed.

All which actings, doings, and pretenses of said company is contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your oratrix in the premises.

In further consideration whereof and forasmuch as your oratrix is remediless in the premises at and by the strict rules of the common law and is *receivable* only in a court of equity, where such things are perfectly cognizable and *receivable*, to the end, therefore, that said Union Mutual Life Insurance Company may true
341 answer make to all and singular the premises, but not under oath, the benefit whereof is expressly waived by your oratrix; that your oratrix may be allowed to redeem said premises according to the terms of said agreement; that said defendant may be compelled by the decree of this court to perform the said agreement with your oratrix and convey to her the said two lots of land hereinbefore specifically described, according to the terms thereof, as before stated, and account to your oratrix for the rents and profits of said premises since the date of said agreement, your oratrix being ready and willing and duly offering to perform the said agreement in all things on her part, and that your oratrix may have such other and further relief in the premises as the equities of her case may require and to your honors shall seem meet—

May it please your honors to grant unto your oratrix the people's writ of summons in chancery, directed to the sheriff of said county of Cook, commanding him that you summon the defendant, The Union Mutual Life Insurance Company, to appear before this honorable court on the first day of the Jult term thereof, to be held in the court-house in Chicago, in said county, on the third Monday

of July, A. D. 1882, then and there to answer this bill, &c. ; and, as in duty bound, your oratrix will ever pray.

ELIZABETH KIRCHOFF,
By W. S. HARBERT, *Her Solicitor.*

W. S. HARBERT,
GEO. R. DALEY,
Solicitors for Complainants.

342 And afterwards, to wit, on the 12th day of July, A. D. 1887, there was filed in said cause a certain proposed amended bill in the words and figures following, to wit.

Proposed Amended Bill.

STATE OF ILLINOIS, {
County of Cook, } ss :

In the Circuit Court of said County.

To the honorable the judges of the circuit court of said county of Cook, in chancery sitting :

Humbly complaining, sheweth unto your honors your oratrix, Elizabeth Kirchoff, wife of Julius Kirchoff, of Chicago, in said county, that on or about the eight-day of May, 1871, your oratrix, together with her said husband and her mother, Angelo Diversey, borrowed of the Union Mutual Life Insurance Company, a corporation subsisting under the laws of the State of Maine, the sum of sixty thousand dollars (\$60,000), and to secure the payment thereof, with interest thereon, executed their promissory note jointly and severally for said sum of money, payable to said company, and also a trust deed (to Levi D. Boone as trustee) on a large amount of real estate in said county belonging to your oratrix, including, among other lots and parcels, the following-described lots of land, situated in Chicago, in said county, and known as lots two (2) and four (4), in block twenty-one (21) of the Canal Trustees' subdivision of the south fractional quarter of section three (3), township thirty-nine (39) north, range fourteen (14) east, of the third principal meridian.

343 That afterwards, to wit, some time during the year eighteen hundred and seventy-eight (1878), default having been made in the payment of said money, the said insurance company instituted proceedings for the foreclosure of said trust deed and a sale of the real estate of your oratrix therein described.

That thereupon your oratrix, through her said husband as her agent, offered said company to release and quitclaim to said company all and singular her land and premises in said trust deed described, provided said company would allow your oratrix to redeem from said trust deed said two lots of land hereinbefore specifically described (one of which two lots was at that time occupied by your oratrix as a homestead) upon payment of whatever sum of money the said lots, with the improvements thereon, should

be valued at by an appraiser to be agreed upon by said company and your oratrix, and provided also that said company should take the remainder of the land in said trust deed described, belonging to your oratrix, other than the two before-mentioned lots, in full satisfaction of the indebtedness of your oratrix to said defendant beyond the amount at which said two lots should be so appraised; that said company accepted said offer and agreed to allow such redemption of said lots by your oratrix upon the terms proposed and for the consideration aforesaid.

That it was further agreed by and between your oratrix and said defendant, and in further consideration for such surrender and conveyance by her, that after receiving the said quitclaim deed
344 from your oratrix the said defendant company would execute back to her a deed of conveyance of the two lots before described, and that your oratrix should be allowed to pay said redemption money in like manner and upon such terms as said company were at or about that time offering to purchasers of their real estate, to wit, in ten equal annual installments, with interest at the rate of six per cent. per annum until paid, the first of which installments was to be paid upon the delivery of the deed to your oratrix, and the remainder in one, two, three, four, five, six, seven, eight, and nine years thereafter respectively, said deferred payments to bear interest at the rate of six per cent. per annum until paid, and that to secure said deferred payments your oratrix would execute and deliver to said defendant a mortgage on said two lots.

That thereupon said company, in pursuance of said agreement, designated one James H. Rees, of said city of Chicago, as a proper and competent person to appraise the said two lots of land, and your oratrix, through her said husband, assented to the employment of said Rees for such purpose; that thereupon the said Rees, together with one E. A. Warfield, the financial agent of said company, and R. B. Kendall, the attorney for said company, and your oratrix's said husband, visited said lots, your oratrix contributing to the expense of said appraisal, and the said Rees, after having viewed the said two lots, appraised the same as follows, to wit: said lot two (2), with the improvements thereon, at the sum of seven thousand five hundred dollars (\$7,500), and said lot four (4) at the sum of two
345 thousand five hundred dollars, of which appraisals the said Rees made report in writing to said company and of which the said company notified your oratrix; which said report, as your oratrix is informed and believes, is now in the possession of said company and to which your oratrix prays leave to refer.

That afterwards, pursuant to the agreement aforesaid, your oratrix and her said husband executed, acknowledged, and delivered to said company a deed and quitclaim of all and singular the land and premises belonging to your oratrix described in said trust deed, including the said two lots hereinbefore specifically described; which said deed, as your oratrix is informed and believes, has since then been recorded in the recorder's office of said county, and to said deed or the record thereof your oratrix prays leave to refer if it be necessary so to do.

That thereafter, upon examination of the title to said lots, it appeared that there were certain intervening liens and incumbrances upon the same, created after the execution of said trust deed and prior to the agreement hereinbefore set forth for such redemption by your oratrix, and it was thereupon represented to your oratrix by said company, through its attorney, that it would be necessary to foreclose said first-described trust deed in order to make good title in said company to said lots of land before it could take a mortgage thereon for said installments of redemption money, and it was thereupon agreed by and between the said company and your oratrix that the agreement for said redemption should not be further performed until after the title had been perfected in said company by said foreclosure proceedings, but the further execution thereof should be

346 held in abeyance until after such foreclosure proceedings should be completed and the title to said lots become perfected in said company, discharged of such incumbrances, &c., and that in the meantime your oratrix should interpose no defense to such foreclosure proceedings.

And your oratrix further shows unto your honors that the said company, in pursuance of said agreement, continued the prosecution of its suit in the circuit court of the United States for the northern district of Illinois for the foreclosure of said trust deed and obtained a decree of foreclosure and sale, under and by virtue of which said decree said lots were afterwards, to wit, on the 20th day of October, A. D. 1880, offered for sale by the master in chancery of said court and were sold and struck off to said company at said sale as follows, to wit, said lot two (2) for the sum of nine thousand dollars (\$9,000) and said lot four (4) for the sum of eight thousand dollars (\$8,000), and that deeds of said lots have since been issued and delivered to said company by the said master in chancery and have been recorded in said recorder's office.

That in said suit for foreclosure the said company procured the appointment of a receiver of all the land and premises involved in said suit, your oratrix making no defense to said suit, and that afterwards, on, to wit, the 16th day of November, 1881, said receiver demanded possession of said lot two (2), which was occupied by your oratrix and her husband as a homestead, and applied to said court for a writ of assistance to put him, said receiver, in possession thereof.

347 That thereupon your oratrix, through her said husband, resisted said application for said writ of assistance and set up as a defense to the application of said receiver an answer setting forth in substance the aforesaid agreement between said company and your oratrix, but said company, through its solicitors in said suit, supported the application of said receiver and wholly disregarded its agreement with your oratrix and procured an order of said court for the assistance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead.

And your oratrix well hoped that upon the execution and delivery of said master's deeds of said lots to said company (which said deeds were issued on or about the twenty-first day of January, A. D. 1882)

the said company would in good faith keep and perform its said agreement with your oratrix and convey said two lots to your oratrix upon the terms aforesaid.

But now so it is that said Union Mutual Life Insurance Company utterly refuses to carry out its said agreement with your oratrix, and falsely and fraudulently claims to hold and own said two lots of land in fee-simple absolute, free and discharged of any equitable interest therein on the part of your oratrix, and seeks to deprive your oratrix of her rights in the premises and refuses to convey to your oratrix the said lots of land, or either of them, upon the terms agreed upon as aforesaid, and gives out and pretends that no such agreement was ever made or entered into between said company and your oratrix, whereas your oratrix charges the contrary
348 to be the truth, and that she is justly entitled to a redemption of said lots and a conveyance from said company upon the terms aforesaid.

And your oratrix further shows unto your honors that she has in good faith kept and performed her part of said agreement for the redemption of said lots, so far as she has been able to do, by the delivery of her said deed of release and quitclaim to said company, and has refrained from interposing any defense to said foreclosure proceedings in full faith and reliance that the said agreement would be kept and performed by said company, and that she has always been and is now ready and willing to keep and perform the whole of said agreement on her part to be performed.

All which actings, doings, and pretenses of said company is contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your oratrix in the premises.

In further consideration whereof and forasmuch as your oratrix is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity, where such things are perfectly cognizable and relievable, to the end, therefore, that said Union Mutual Life Insurance Company may true answer *amke* to all and singular the premises (but not under oath, the benefit whereof is expressly waived by your oratrix); that your oratrix may be allowed to redeem said premises according to the terms of said agreement; that said defendant may be compelled by the decree of
this court to perform the said agreement with your oratrix
349 and convey to her the said two lots of land hereinbefore specifically described, according to the terms thereof as before stated, and account to your oratrix for the rents and profits of said premises since the date of said agreement, your oratrix being ready and willing and duly offering to perform to said agreement in all things on her part, and that your oratrix may have such other and further relief in the premises as the equities of her case may require and to your honors shall seem meet:

May it please your honors to grant unto your oratrix the people'd writ of summons in chancery, directed to the sheriff of said county of Cook, commanding him that he summon the defendant, The Union Mutual Life Insurance Company, to appear before this honorable court on the first day of the July term thereof, to be held in

the court-house in Chicago, in said county, on the third Monday of July, A. D. 1882, then and there to answer this bill, &c.; and, as in duty bound, your oratrix will ever pray.

ELIZABETH KIRCHOFF,
By W. S. HARBERT AND
GEORGE R. DALEY,

Her Solicitors.

W. S. HARBERT &
GEO. R. DALEY,

Solicitors for Complainant.

350 And thereupon, on the same day, to wit, the 12th day of July, A. D. 1887, the following, among other, proceedings were had and entered of record in said court, to wit:

Order, July 12, '87.

ELIZABETH KIRCHOFF	} 41522, 129. Bill and Amended Bill.
<i>vs.</i>	
UNION MUTUAL LIFE INSURANCE COMPANY.	

And now, on this day, come the said parties, by their respective solicitors, and this cause coming on to be heard upon the pleadings herein and testimony adduced in open court, the court, after hearing counsel for the respective parties and being now fully advised in the premises, finds that the complainant is not entitled to the relief prayed for in her amended bill of complaint herein.

And thereupon, and after the court had announced its opinion, the complainant, by her solicitor, asks leave to file an amended bill herein. The court, after hearing counsel for the respective parties and being now fully advised in the premises, doth refuse leave to file an amended bill and doth order, adjudge, and decree that the amended bill in this cause be, and it hereby is, dismissed out of this court at the complainant's cost for want of equity.

Therefore it is ordered and considered that the defendant have and recover of the complainant its costs in this behalf expended, to be taxed, and that execution issue therefor.

351 And thereupon the complainant, by her solicitor, prays an appeal to the supreme court of the State of Illinois, which is granted on condition that said complainant doth, within sixty days from date, execute and file a good and sufficient appeal bond in this cause in the penal sum of three hundred dollars, with surety to be approved by the court.

And it is further ordered that the complainant have sixty days from date in which to prepare and file a certificate of evidence herein.

352 And afterwards, to wit, on the 9th day of December, A. D. 1890, there was filed in said court a certain appellate-court order reversing and remanding and a certain *procedendo*; which appellate-court order and *procedendo* are in the words and figures following, to wit:

At a term of the appellate court begun and held in Chicago on Tuesday, the seventh day of October, in the year of our Lord one thousand eight hundred and ninety, within and for the first district of the State of Illinois.

Present: The Honorable Thos. A. Moran, presiding justice.

" " " A. N. Waterman, justice.

" " " Jos. E. Gary, justice.

Thomas G. McElligott, clerk; James H. Gilbert, sheriff.

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE COM-
PANY.

No. 3359. A. D. 189-
Error to Cook Circuit
Appeal.

On this day came again the said parties, and the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error and being now sufficiently advised of and concerning the premises are of the opinion that in the record and proceedings aforesaid 353 said and in the rendition of the judgment aforesaid there is manifest error. Therefore it is considered by the court that for that error and others in the record and proceedings aforesaid the judgment of the circuit court of Cook county in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the circuit court of Cook county with directions to that court to enter a decree in conformity with the opinion filed herein; and it is further considered by the court that the said Elizabeth Kirchoff, plaintiff in error, recover of and from the said Union Mutual Life Insurance Co., defendant in error, her costs by her in this behalf expended, to be taxed, and that she have execution therefor.

I, Thomas G. McElligott, clerk of the appellate court of the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 8th day of [SEAL.] December, in the year of our Lord one thousand eight hundred and ninety.

THOMAS G. McELIGOTT,

Clerk of the Appellate Court of the First District.

STATE OF ILLINOIS, }
Appellate Court, First District, } ss:

354

Procedendo.

The People to the State of Illinois to the circuit court of the county of Cook, Greeting:

Whereas in a certain plea which was before the circuit court of Cook county between Elizabeth Kirchoff, plaintiff, and Union Mutual Life Insurance Company, defendant, the judgment of said

circuit court of Cook county was rendered in favor of said Union Mutual Life Insurance Company and against the said Elizabeth Kirchoff, Elizabeth Kirchoff having sued out a writ of error from the appellate court within and for the first district of said State, which was granted by the said appellate court of the 1st district of Illinois on entering into bond according to law, and the said appellate court having reversed the judgment of the said circuit — of Cook county, as per mandate of the supreme court filed herein, we therefore command you and every one of you that you proceed with effect according to law, notwithstanding the said appeal.

Witness Hon. Thos. A. Moran, presiding justice of the appellate court, and the seal thereof, at Chicago, this 8th day of December, in the year of our Lord one thousand eight hundred and ninety.

THOS. G. McELIGOTT,

Clerk of the Appellate Court of the First District.

355 And thereupon, on the same day, to wit, the 9th day of December, A. D. 1890, the following proceedings were had and entered of record in said court, to wit:

DEC. 9TH, 1890.

ELIZABETH KIRCHOFF	}	41522. Bill and Amended Bill.
<i>vs.</i>		
UNION MUTUAL LIFE INSURANCE COMPANY.		

On motion of the complainant's solicitor and notice filed, it is ordered that this cause be, and it is hereby, docketed.

And afterwards, to wit, on the 4th day of February, A. D. 1891, the following proceedings were had and entered of record in said court, to wit:

FEB'Y 4, '91.

ELIZABETH KIRCHOFF	}	41522. Bill and Amended Bill.
<i>vs.</i>		
UNION MUTUAL LIFE INSURANCE COMPANY.		

On motion of complainant's solicitor, it is ordered that this cause be, and is hereby, referred to I. K. Boyesen, Esq., one of the masters of this court, to take and state an account and report the same to this court with all convenient speed.

And afterwards, to wit, on the 9th day of January, A. D. 1892, there was filed in said court a certain master's report, which is in the words and figures following, to wit:.

STATE OF ILLINOIS, }
 County of Cook, } ss :

In the Circuit Court of Cook County, Jan'y 9, '92.

ELIZABETH KIRCHOFF
 vs.
 THE UNION MUTUAL LIFE INSURANCE CO. } 41522.

Pursuant to the order of reference heretofore made in the above-entitled cause to me to state an account between said Union Mutual Life Insurance Co., the defendant, and the complainant, Elizabeth Kirchoff, as mortgagor, I have considered the account by said defendant of its debits and credits, receipts and expenditures in connection with said property, and the objections filed thereto by complainant, and have taken the testimony and evidence hereunto annexed and made a part hereof, and from such evidence I find
 357 and would respectfully report that the account between said complainant and defendant stands as follows, and the Union Mutual Life Insurance Co. is to be credited with the following items:

Principal.....	\$10,000 00
Interest on said amount for 12 years and 2 months....	7,300 00
Further credits allowed to the defendant for legitimate expenditures allowed by me and as shown by the account filed by said Union Mutual Life Insurance Co.....	4,255 18
	<hr/>
	\$21,555 18

Master's Statement.

Said company is to — debited as follows:

Rents and profits as shown by statement of receipts filed by said Union Mutual Life Insurance Co.....	4,938 68
	<hr/>
	\$16,616 50

In arriving at said amount I have disallowed the items of credit claimed by the said Union Mutual Life Insurance Co. included in its account, from item No. 1 to item No. 16, inclusive, all of said items being for tax deeds, for taxes and assessments, and abstract of title paid for by said company prior to September 12, 1879, the date fixed by the appellate court as the date when the contract between the Union Mutual Life Insurance Co. and said Elizabeth Kirchoff was to take effect; and from an examination of said case of Kirchoff
 358 vs. The Union Mutual Life Insurance Co. in the appellate court and the affirmance thereof by the supreme court, I have arrived at the conclusion that it must have been the view of the appellate court and that court must have held that by virtue of the contract found by it to exist between said company and said

Elizabeth Kirchoff said company had agreed to convey to her such title as it might have on said date fixed by the court, and that all items entering into and making up the sum of \$10,000, which said Kirchoff was to pay in order to redeem said property in controversy in this cause, must be presumed to include and cover all items of expenditure incurred by the company prior to that date.

I have also disallowed item No. 22, claimed by Master' of said defendant under date of December 28, 1881, statement. because there is no evidence in the record to support the same or show what the same is for. I have

also disallowed item No. 26, under date October 16, 1882, as paid to E. F. Runyan for quitclaim deed, because the evidence fails to disclose that said expenditure was reasonable and necessary or beneficial to the property. All of the other items in the account of the said defendant, The Union Mutual Life Insurance Co., I have allowed.

Objection has been made by the complainant to many of said items, and it has been contended they should not be allowed, on the ground that they are insufficiently proven and the necessity for the expenditures or improvements and repairs has not been shown. Taking into account that the corporation necessarily does business

359 through agents and ordinarily from time to time changes its agents, and that consequently there is no one individual who is charged with knowledge of every transaction pertaining

to every piece of property that may belong to the company or of which it may be in possession, I have allowed the entries in the books of the companies of expenditures made for repairs as being sufficient evidence of the fact that such repairs were made and that they were necessary, particularly as the company at this time regarded and considered itself as the absolute owner of this property and was dealing with it as though it were its own, and it must be presumed that they did not make any expenditures for repairs that were unnecessary, or that they had a sum in excess of what it was necessary to pay to get the repairs made, and in the absence of any evidence controverting the entries in the books of the company for such expenditures for repairs. I have considered the same sufficiently proven, and have allowed them. Another objection made by the complainant is to the allowance of commissions paid by the company to D. G. Hamilton for paying taxes on the property in controversy, it being contended on behalf of the complainant that the company cannot charge the complainant with the expenditure made by it in employing an agent to pay the taxes, and that such expenditures are unnecessary and not beneficial to the complainant. It appears by the evidence that the company had a contract with said D. G. Hamilton, its agent, for the purpose of paying its taxes, covering not only the property in controversy, but

360 all the property owned and controlled by it or in which it was mortgagee in Cook county, and I find that such commission paid was reasonable and legitimate, and it furthermore being a usual and ordinary thing for large corporations or

Master's statement.

even individuals owning large amounts of property to employ tax agents to look after their taxes and assessments. I find that such expenditure by the company was a usual, ordinary, and reasonable expenditure, which may legitimately be charged to the property, and I have therefore allowed said items of commission paid to the agent of the company for paying taxes upon the property in question. A further objection made by the complainant to the account of said defendant is the payment of commission by said defendant to an agent for collection of rent. Such commission being five per cent. on the rent collected, I find that such commissions are reasonable and are the ordinary and usual commissions paid in the city of Chicago for the collection of rents of the character involved in the controversy in this suit, and I also hold, as a matter of law, that a mortgagee in possession may be credited with such expenditures paid by him for collecting the rents on the property, otherwise protecting the same or taking charge thereof, as an ordinarily prudent and diligent man would be likely to incur in the protection of his own property, and upon that principle I conclude that the payments made by the company for the collection of such rent and the payment of such taxes were and are such reasonable expenditures as prudent men holding or controlling large amounts of property generally incur in and about their own property.

I therefore find that the amount which the said complainant should pay in order to redeem said property as decreed by this honorable court is the sum of \$16,616.50, together with interest thereon from the 14th day of November, 1891.

Respectfully submitted.

I. K. BOYESEN.

Master in Chancery, Circuit Court.

Master's fees, \$150.00, for test. and report. Paid by def't. Nov. 13, 1891.

STATE OF ILLINOIS, }
County of Cook, } ss :

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF

vs.

THE UNION MUTUAL LIFE INSURANCE CO. }

Supplemental Report.

I would respectfully report that upon the filing of the objections herein of the defendant, The Union Mutual Life Insurance Company, I have sustained the second objection of said defendant, because it appears that the item of \$85.00 for an

Master's report.

abstract, which I disallowed for want of evidence, and the item of \$100.00 paid to E. F. Runyan for a quitclaim deed, which I also disallowed for want of evidence, should have been allowed by virtue of a stipulation and

362 agreement made between the parties hereto and embodied in the record, and I therefore find that there should be added to the amount of credits allowed to the Union Mutual Life Insurance Co., in addition to the sum of \$4,255.18 heretofore allowed by me, the sum of \$185.00, making the total amount of said credits the sum of \$4,440.18, and the amount to be paid by the complainant, in order to redeem, the sum of \$16,801.50.

Respectfully submitted.

I. K. BOYESEN,

Master in Chancery, Circuit Court.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF

vs.

THE UNION MUTUAL LIFE INSURANCE CO. }

Supplemental Report.

Since the preparation and signing of my original report herein the defendant has brought in a statement of rents collected by it since the original statement of receipts and disbursements filed with me by the defendant, from which statement it appears that the said defendant has collected since May 1, 1891, \$360.00 in rents, and has expended \$49.34 for abstracts and assessments upon said 363 property and commissions paid for collection of said rent, making a total sum of \$360.00 collected and \$49.34 expended, leaving a balance to be credited to the complainant of \$310.66, which sum should be deducted from the sum of \$16,801.50, the amount found by me in the original report as the amount to be paid by the complainant in order to redeem, and leaves *the* to be paid by the complainant the sum of \$16,490.84.

Respectfully submitted.

I. K. BOYESEN,

Master in Chancery, Circuit Court.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF

vs.

THE UNION MUTUAL LIFE INSURANCE COMPANY. }

To the Honorable I. K. Boyesen, one of the masters in chancery of said court:

The Union Mutual Life Insurance Company, defendant in the above-entitled cause, by Grosscup & Wean, its solicitors, submits the following statement on account of the property involved in said

cause, described as lots 2 & 4, in block 21, Canal Trustees' subdivision of the south fractional quarter of section 3, town. 364 39 north, range 14 east, of the 3rd P. M.; and the said defendant asks to be credited with the following amounts, with interest thereon from the respective dates as given below :

364a

1. Sept. 5th, 1879.	\$10,000 00
2. " 30th, 1876.	Taxes & tax deeds, D. G. Hamilton.....	302 09
3. Oct'r 25th, "	Taxes & tax deeds, D. G. Hamilton.....	321 54
4. Nov'r 24th, "	First Lincoln Park assessment.....	21 51
5. Sept. 24th, 1877.	Second Lincoln Park assessment.....	17 11
6. Oct'r 10th, "	Special assessment.....	78 25
7. " 6th, "	Taxes, State and county.....	163 03
8. " 22d, "	Taxes, State and county, appeals, 1872.....	117 75
9. Feb'y 22d, 1878.	Abstract of title, 31053.....	85 00
10. M'ch 16th, "	Tax deed.....	153 40
11. Oct'r 9th, "	Third Lincoln Park assessment.....	16 56
12. Nov'r 1st, "	General taxes of 1877.....	212 32
13. " 22d, "	General taxes of 1873-'4.....	219 24
14. Aug. 11th, 1879.	Tax deed from city.....	151 31
15. Sept. 2d, "	Sp'l assessment for paving Rush St.....	128 73
16. Ap'l 26th, 1880.	Fifth Lincoln Park assessment.....	14 65
17. " 27th, 1881.	General tax of 1880.....	166 84
18. " " "	Sixth Lincoln Park assessment.....	14 09
19. May 2d, "	Haddock, Cox & Co., abstract 36488.....	40 00
20. " 4th, "	Insurance.....	12 00
21. Oct'r 29th, "	39 ft. sidewalk, Pine St., 12 ft. W., 9 ft. H.....	35 00
22. Dec'r 28th, "	Tax deeds.....	15 50
23. May 1st, 1882.	Gen'l taxes, '81, \$164.74; com., \$4.12.....	168 86
24. " " "	7th Lincoln P'k ass't, \$13.54; com., 34c.....	13 88
25. Oct'r 21st, "	Insurance.....	8 00
26. " 16th, "	Paid E. F. Runyan for quitclaim deed.....	100 00
27. Ap'l 3d, 1883.	General repairs.....	200 00
28. May 1st, "	Gen'l taxes, '82, lot 2, \$138.29; C., \$3.46.....	141 75
29. " " "	Gen'l taxes, '82, lot 4, \$71.91; c'n, \$1.78.....	72 97
30. " " "	8th Lincoln P'k ass't, lot 2, \$9.28; C., 23c.....	9 51
31. " " "	8th Lincoln P'k ass't, lot 4, \$4.12; C., 10c.....	4 22
32. Nov'r 8th, 1883.	Insurance.....	15 00

364b

33. July 14th, "	Water tax.....	60 50
34. Ap'l 28th, 1884.	Gen'l taxes, 1883, lot 2.....	175 22
35. " " "	Gen'l taxes, 1883, lot 4, \$48.24; C., 1.30.....	49 54
36. " " "	9th Lincoln P'k ass't, lot 2.....	8 88
37. " " "	9th Lincoln P'k ass't, lot 4.....	3 55
38. June 20th, "	Paid for sidewalk, Pearson St.....	40 32
39. Oct'r 22nd, "	Insurance.....	15 00
40. M'ch 24th, 1885.	New roof.....	55 00
41. Ap'l 25th, "	Gen. taxes, '84, \$225.43; chgs. \$1.21.....	226 64
42. June 24th, "	Repairing chimney.....	6 00
43. Aug. 28th, "	Water tax.....	11 25
44. Oct'r 16th, "	Insurance.....	15 00
45. Nov'r 6th, "	Special taxes.....	68 13
46. M'ch 12th, 1886.	Repairs on barn.....	12 00
47. Ap'l 15th, "	Gen. tax, '85, lot 2, \$181.60; C., \$4.54.....	186 14
48. " " "	Gen. tax, '85, lot 4, \$49.95; com., \$1.33.....	51 28
49. " " "	11th Lincoln Park assessment.....	11 31
50. June 3d, "	Sp'l ass't—curb'g, grad'g, & pav'g Pearson St., lot 2, \$463.89; com., \$12.60.....	475 49
51. " " "	Sp'l ass't—curb'g, grad'g, & pav'g Pearson St., lot 4, \$10.03; com., 25 cts.....	10 28
52. Oct'r 1st, "	Insurance.....	15 00
53. May 2d, 1887.	Gen. tax, '86, lot 2, \$182.92; com., \$4.76.....	187 68
54. Oct'r 8th, "	Gen'l taxes and costs, lot 4.....	57 13

ELIZABETH KIRCHOFF.

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55.	May	2d,	"	12th Lincoln P'k ass't.....	\$10 76
56.	June	17th,	"	Repairs.....	30 00
57.	Aug.	26th,	"	Half repairs on sewer.....	12 23
58.	Oct.	10th,	"	Insurance.....	15 00
59.	Jan.	20th,	1888.	67 feet of sidewalk.....	18 76
60.	Ap'l	11th,	"	Gen. taxes, '87, \$232.34; com., \$5.81.....	238 15
61.	Oct.	30th,	"	13th Lincoln P'k assessment.....	11 56
62.	"	20th,	"	Insurance.....	20 00
63.	Ap'l	1st,	1889.	Repairing sidewalk.....	12 00
64.	"	26th,	"	Gen. taxes, '88, \$237.43; com., \$5.93.....	243 36
65.	"	"	"	Sp'l ass't—curb'g, grad'g, & paving Tower Pl., lot 4, \$125.71; com., \$3.14.....	128 85
66.	"	"	"	Sp'l ass't, sidewalk Pearson St., lot 2, \$43.20; commission, \$1.08.....	44 28
67.	"	"	"	Sp'l ass't, grading & paving Rush St., lot 2, \$166.32; com'n, \$4.16.....	170 48
68.	"	"	"	14th Lincoln P'k ass't, \$9.64; C., 24 cts.....	9 88
69.	Sept.	6th,	1889.	Repairing roof.....	20 00
364c					
70.	Oct.	22d,	"	Insurance.....	20 00
71.	Ap'l	1st,	1890.	Gen. taxes, '89, \$245.02; com., \$6.12.....	251 14
72.	"	"	"	15th Lincoln P'k Ass't, \$9.08; com., 23 cts.....	9 31
73.	Oct.	1st,	"	Insurance.....	20 00
74.	Sept.	12th,	"	146 ft. sidewalk, Pearson St., lot 2.....	37 96
75.	Ap'l	28th,	1891.	Gen. taxes, '90, \$280.98; com., \$7.02.....	288 00

Receipts.

The said defendant, the Union Mutual Life Insurance Company, charges itself with the following receipts:

1.	Dec.	1st,	1880.	E. A. Warfield, receiver.....	\$148 16
2.	Ap'l	9th,	1881.	James H. Gallery, receiver.....	97 60
3.	Aug.	1st,	1882.	James R. Page, receiver.....	9 12
4.	Dec.	31st,	1883.	Rents collected, \$480, less 5 %, \$24.00.....	456 00
5.	"	"	1884.	Rents collected, \$541, less 5 %, \$27.05.....	513 95
6.	"	"	1885.	Rents collected, \$720, less 5 %, \$36.00.....	684 00
7.	"	"	1886.	Rents collected, \$720, less 5 %, \$36.00.....	684 00
8.	May	18th,	1887.	Rebate sp'l ass't, No. 6047.....	130 43
9.	Dec.	31st,	"	Rents collected, \$660, less 5 %, \$33.00.....	627 00
10.	"	"	1888.	Rents collected, \$496, less 5 %, \$54.80.....	471 20
11.	"	"	1889.	Rents collected, \$504, less 5 %, \$25.20.....	478 80
12.	"	"	1890.	Rents collected, \$504, less 5 %, \$25.20.....	478 80
13.	Jan.	31st,	1891.	Rents collected, \$42, less 5 %, \$2.10.....	39 90
14.	Feb.	24th,	"	Rents collected, \$42, less 5 %, \$2.10.....	39 90
15.	Mar	21st,	"	Rents collected, \$42, less 5 %, \$2.10.....	39 90
16.	Ap'l	24th,	"	Rents collected, \$42, less 5 %, \$2.10.....	39 90

UNION MUTUAL LIFE INS. CO.,
By GROSSCUP & WEAN, *Its Solicitors.*

Exceptions to Master's Report.

STATE OF ILLINOIS, } ss :
 Cook County, }

In the Circuit Court of said County.

ELIZABETH KIRCHOFF	}	Complainant's Exceptions to Master's Report.
vs.		
THE UNION MUTUAL LIFE INSURANCE COMPANY.		

Comes now the complainant herein and files these her exceptions to the report of I. K. Boyesen, master in chancery, to whom said cause was referred to state an account between the complainant and defendant.

First. Complainant objects and excepts to the allowance to defendant on account of alleged commissions for the collection of rents from or payment of taxes on the property in controversy, for the reason that such charges are not proper charges by any mortgagee in possession, and much less in favor of a mortgagee wrongfully in possession, and for the further reason that it is not shown that such commissions were either customary or actually paid.

Second. Complainant excepts to the allowance to defendant of items 33 and 43 for water tax, because such tax pertains to the use and occupancy of the premises, and it is not shown that under the leases it was the duty of the landlord to pay such water taxes.

366 Third. Exception is made to the allowance to defendant of the repairs charged, for the reason that there is no sufficient evidence that they were reasonable or necessary or actually paid as charged.

Fourth. Exception is made to the master's report in this, that it fails to charge the defendant interest on the several items, with which it should be charged, from the date of the receipt by it of the several sums of money respectively.

All of which is respectfully submitted.

HARBERT & DALEY,
Complainant's Sol'rs.

I have considered and overruled the foregoing objections.

I. K. BOYESEN,
Master in Chancery, Circuit Court.

STATE OF ILLINOIS, } ss :
Cook County, }

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF }
vs. }
UNION MUTUAL LIFE INSURANCE COMPANY. }

Suggestions, Motion, Notice, and Objection- on Behalf of Defendant.

367 Objections to master's report.

The defendant submitted the items of expenditure on account of taxes and tax titles acquired by it, represented by items from No. 2 to fifteen, inclusive, of the statement of account submitted, for the reason that it supposed the complainant desired to remove the liens created thereby from the property. It expressly, in the proceedings before the master, stated this to be the sole object of bringing the attention of the master and complainants to these items, and if the same were not accepted by the complainant the said items should not be regarded as a part of the account submitted. The complainant having refused to accept them, the defendant objects to their consideration by or inclusion in the master's report, and if a formal withdrawal is necessary, hereby *witness* withdraws the same, giving notice hereby to complainant that it will insist upon the several liens thus acquired by it and represented by said items as independent and separate liens upon and titles to said property and not included within the letter or intent of the opinion and order of the appellate and supreme courts, and that in accordance with this view the defendant will not admit that said orders and opinion require it to quitclaim the liens and titles thus independently acquired.

2. This defendant further objects to the finding of the master with reference to the credits allowed the defendant for legitimate expenditures, and insists that item No. 9 in defendant's statement under date of February 22nd, 1878, for abstract of title, 368 \$85.00, and item No. 26 of said statement, under date of October 16th, 1882, for \$100.00, paid to E. F. Runyan, should be allowed as credits to the defendant, for the reason that the record shows that the complainant's counsel stipulated that the same were proper and reasonable charges against the complainant in said accounting.

Respectfully submitted.

GROSSCUP & WEAN,
Sol'rs for Def't.

I have allowed the second objection of the defendant and have overruled the first.

I. K. BOYESEN, *Master.*

WILLIAM MILLS, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. WEAN:

Q. What is your full name?

A. William Mills.

Q. What is your business?

A. Book-keeper.

Q. With whom are you employed?

371 A. D. G. Hamilton.

Q. How long have you been with Mr. Hamilton?

A. About twelve years.

Q. Since what time?

A. I was with him in 1873, and went away again two or three years. It must be—

Q. About the time?

A. About twelve years, I think, somewhere.

Q. I want to get at the period of time.

Mr. GROSSCUP: Twelve years last past.

Mr. WEAN: Is that what you mean—twelve years last past?

A. Yes, sir.

Q. What portion of the book-keeping do you look after?

A. I look after the whole of it now.

Q. Have you examined Mr. D. G. Hamilton's books with reference to moneys paid to him by the Union Mutual Life Insurance Company on account of taxes and tax claims on lots 2 and 4, in block 21, Canal Trustees' subdivision of the south fractional quarter of section 3, town. 39 north, range 14 east, of the 3rd principal meridian?

A. Yes, sir.

Q. You may state what the books show as to amounts paid by the Union Mutual Life Insurance Company to Mr. Hamilton for taxes and tax claims—first, September 30, 1876.

372 Mr. HARBERT: I object to that, no sufficient foundation being laid for the testimony and not the best evidence.

Mr. GROSSCUP: The books referred to by Mr. Mills are in Mr. Hamilton's office in this city and are open to the inspection of counsel or the master at any time. We are offering this in lieu of the necessity of bringing the books here.

(Mr. Grosscup referred to a statement.)

Mr. HARBERT: With that understanding, this objection is modified and applies to the books themselves, the copy being considered the same as the original.

Mr. GROSSCUP: In other words, you do not object to our putting on the records here what the books show, in the manner in which we offer it; you object to the incompetency and irrelevancy of the evidence the same as if we offered it?

Mr. HARBERT: Yes, sir.

(Question read.)

Mr. HARBERT: We further object to showing any expenditures on account of taxes or for other purposes prior to the date fixed by the appellate court in the opinion of September 10, 1879, and by consent of counsel this objection will apply to all subsequent questions relating to items prior to that date.

(Question read.)

A. On September 30, 1876, the Union Mutual Life Insurance Company paid Mr. D. G. Hamilton \$302.09 for tax deed on lots 2 and 4, block 21.

Mr. HARBERT: This answer is further objected to for the reason that it purports to show what the company paid to Mr. 373 Hamilton and not what the company, through Mr. Hamilton, paid on account of taxes or tax claims, and fails to disclose the taxes for which the property was sold, the portion of the property which was sold, and the amount of the taxes for which sold or any other matter upon which the reasonableness or propriety of the charge may be predicated. The answer is also objected — on the ground that it is not covered by the agreement of waiver of the production of the books, in that it relates to an account between the company and Mr. Hamilton and not expenses by Hamilton, and not expenses by Hamilton for the company.

Mr. WEAN: Do you want us to bring the books up?

Mr. HARBERT: If you are going into an account between Hamilton and the company, I do.

Mr. GROSSCUP: At the time of September 10—you can see the books; they are open to inspection.

Mr. HARBERT: I would rather have the books.

Mr. GROSSCUP: May it please your honor, it is necessary, as we take it here, to introduce the entries on the books of Mr. Hamilton, showing payments made by the Union Mutual Life Insurance Company to him on account of tax titles, etc. We have his book-keeper here who has those entries and can offer them himself, and is ready to spread them on the record. The books are at Mr. Hamilton's office and cannot be brought here without disarranging his whole business and without his being present, as the entries are among

other entries that he does not care to disclose, not relating to 374 this matter at all.

The MASTER: If they are willing, that would be a proper way; if objected to, I could not allow it.

Mr. HARBERT: These books are fifteen years old, and it is not likely they are using them now.

The MASTER: I will be willing to go the office of the company and take the testimony right there and have each item verified by the books.

Mr. HARBERT: I would rather see them at the time of testifying. If they cannot submit the books to me now they might not be able to when I came to cross-examine.

The MASTER: Do I understand your objection goes to the competency of the proof offered or only the form?

Mr. HARBERT: It goes to both. We waived it with reference to being a copy until I found the evidence being offered related to expenditures by Hamilton for the company. It purports to go into an accounting between Hamilton and the company, and that is a matter I want the books for. If this was simply a copy of what Mr. Hamilton paid out for the company, I would just as soon have the copy, but to go into an account between those two, I want the books.

The MASTER: Mr. Wean, would it be competent to all to show what Mr. Hamilton received from the company without showing the original entries of the expenditures by Hamilton for the company?

375 Mr. HARBERT: I have so objected.

Mr. WEAN: He has objected to this on that ground.

Mr. HARBERT: I have a tax abstract here showing the taxes paid way back to the present time. If you are going to put in something else, I object.

Mr. WEAN: Those were taken up by Mr. Hamilton before he had anything to do with the insurance company as an agent, as far as that is concerned.

Mr. HARBERT: That don't appear at all. I think it would simplify matters somewhat to have the master pass upon my first objection here first.

Mr. WEAN: We propose to introduce these items or offer them anyway.

Mr. HARBERT: You might offer them in a general way, and it might save volumes of testimony, etc., and we could meet the first objection first.

The MASTER: I do not see, Mr. Grosscup, how it would be competent, as against the complainant in this case, to show what Mr. Hamilton received from the company for these things without showing that Mr. Hamilton had expended for the company these items.

Mr. GROSSCUP: We expect to show that Mr. Hamilton purchased these tax titles as an independent purchaser of titles.

The MASTER: And dealt with the insurance company as a stranger?

Mr. GROSSCUP: Yes, sir.

376 The MASTER: That is a question that would have to be argued.

Mr. GROSSCUP: Do you insist upon seeing these books?

Mr. HARBERT: I think so; it cannot be competent at this stage of the proceedings.

The MASTER: How would it do to have him go on and testify now, and then before cross-examining him have him in the meanwhile find the places in the books, so that he could turn right to them—

Mr. WEAN: Before your cross-examination.

The MASTER: So that he could be prepared to turn to the various items and not waste time in hunting for these things.

Mr. HARBERT:

Q. Have you references to the books from which those items were taken?

A. I have some of them, not all. They are taken off the letter-press statements, some of them.

Mr. HARBERT: I cannot tell where they took them from; he says the letter-press statement—

Mr. WEAN: You found the entries on the regular books, didn't you, also?

A. Yes, sir.

Mr. WEAN: If you can go any further down than those books show, we would like to.

The MASTER: It seems to —, where the evidence is admitted
377 subject to the objection, with the understanding that on cross-examination the books shall be shown, and the books shall be shown, and the books shall have been examined and the places found, it will all appear just the same as it does now, and we would save some time by going on.

Mr. HARBERT: Your honor suggested that that cannot be competent anyhow.

The MASTER: If it be correct, as they show, that Mr. Hamilton bought these titles and the company purchased them from him, then the question is not what Mr. Hamilton has expended for the company, but what did the company expend for obtaining the titles.

Mr. HARBERT: What is the proposition you gentlemen make?

Mr. GROSSCUP: That we go — with the examination-in-chief and put on the record the entries as he has taken them from the books and that before the cross-examination you inspect those entries and cross-examine with reference to such as you think are not fairly presented, or any other cross-examination you desire.

The MASTER: And then Mr. Hamilton will assist you or the company will assist you in finding each item referred to in its testimony.

Mr. HARBERT: Is there any pretence that the items are in any such form as this on the books?

Mr. WEAN: Oh, no; the items are scattered all through the books.

378 The MASTER: Of course the books would be the best evidence.

Mr. HARBERT: I think I would rather have the books now.

At this juncture, 11.15 a. m., adjourned to the office of D. G. Hamilton, room 15, 94 Washington street.

Office of D. G. Hamilton, room 15, 94 Washington street, 11.30 a. m.

D. G. HAMILTON, a witness produced on behalf of the defendant having been first duly sworn, testified as follows:

Direct examination.

By Mr. GROSSCUP :

Q. Please give your name, age, and residence, and occupation.

A. David G. Hamilton ; age, 49 ; residence, Chicago, Illinois ; occupation, real-estate dealer.

Q. Have you had any relations with the Union Mutual Life Insurance Company respecting the payment of taxes and the purchase of tax titles or property in which they were interested as mortgagee or owner or *cestui que trust* ?

A. I have.

Q. You may state if you have paid taxes for them, sold to them tax titles, purchased for them tax titles, etc., or not.

379 A. I have paid taxes for them on property in which they were interested as owner, mortgagee, or otherwise. I have purchased the same at tax sale, and have adjusted and purchased from others tax titles and tax claims against the same property for a great many years, acting as their agent in all these matters.

Q. What was your arrangement for the purchase of tax titles or outstanding tax liens in 1876 ?

Mr. HARBERT : I object to that as immaterial, irrelevant, and incompetent.

A. In 1876 my arrangement with them was that I should buy in at tax sales any of the property in which they were interested, and they were to advance the money—it was to advance the money, not they—and I was to adjust the tax sales with the owners of the property and account out of the proceeds of any adjustment to the company at 10 % interest on the money advanced by them for the sales and one-half the profit over and above the 10 %, retaining the other one-half for my own use and benefit.

Mr. HARBERT :

Q. Was that agreement in writing ?

A. Yes, sir.

Mr. HARBERT : The foregoing answer is objected to.

Mr. GROSSCUP :

Q. Produce the written contract to that effect ?

A. This is it. I don't want that taken away.

Q. We can make a copy of it. You have no objection to a copy being made and the copy going into the record ?

380 A. No, sir.

Mr. HARBERT : I have no objection to a copy in place of the original.

Mr. GROSSCUP : I herewith present to the master the written contract referred to by Mr. Hamilton and identified by him as the original, and by agreement a copy may go into the record instead of the original.

Mr. HARBERT : Yes, sir ; with the same right to object to the copy

as to the original, and objection is made to the original as being incompetent, irrelevant, and immaterial.

Contract offered in evidence and marked Defendant's Exhibit 1, Holway.

Mr. GROSSCUP:

Q. Was that arrangement modified by any subsequent agreement?

Same objection.

A. On the following June there was a new agreement made.

Q. Is that the agreement you have in your hand?

A. Yes, sir.

Q. Executed by yourself and the Co.?

A. Yes, sir.

Mr. GROSSCUP: I now offer the paper just referred to, and by agreement a copy will go into the record with the same effect as the original, subject to the same objection as to relevancy and competency.

Contract offered in evidence and marked Defendant's Exhibit 2, Holway.

381 Mr. HARBERT: The same objection is urged as to the introduction of the former paper—the paper last before offered.

Mr. GROSSCUP:

Q. Were all the advances made by you on account of taxes, etc., after the 30th day of June, 1877, governed by that contract?

A. Yes, sir; it is in force today.

Objected to by counsel for complainant as immaterial, irrelevant, and incompetent.

Q. And it is in force today?

A. Yes, sir.

Q. Do the charges on your books represent the amount you are entitled to under and by virtue of the terms of that contract?

A. They do.

382 Objected to by counsel for complainant as immaterial, irrelevant, and incompetent.

Q. What item on the list known as the defendant's statement began the arrangement under this last-named contract, September 24th, 1887?

A. Yes, sir.

Q. You may take that statement and beginning with No. 2 state to the master what the amounts therein named represent and cover.

Mr. HARBERT: That is objected to, because it does not call for the recollection of the witness independently of the statement, and the witness has in his hands the statement referred to while answering.

A. As to the first item of \$302.09, I will say before I entered into any arrangement with the Union Mutual Life Insurance Co., which

was in 1876, in 1872 I purchased this property as my own investment.

Q. As a stranger?

A. I did not know any of the parties in connection with the matter at all, neither the company nor the owners of the property. On the 28th of October, 1872, for the city taxes of 1871 I took out a deed upon the same in November 18, 1875. Subsequently, on Sept. 30, 1876, I made a conveyance of the same—I will take that back; I mean I sold the title to the Union Mutual Life Insurance Company.

Q. For how much?

A. \$302.09.

Q. What did that embrace?

383 A. It embraced the city taxes of 1871 on lots 2 and 4, in block 21, sold for \$119.48—lot 2, \$64.24; lot 4, \$55.24. They bought it from me just as they would any other tax-title man. I had nothing to do with them whatever. The amount \$302.09 would be legal redemption on the sale that I had and \$61.03 for expenses, cost of deed, and interest and profit. I sold it to them on that day and they paid me for it.

By Mr. WEAN:

Q. Take the next item, \$321.54.

Objected to by counsel for complainant as immaterial, irrelevant, and incompetent.

Mr. HARBERT: As to all inquiries with reference to payments of taxes prior to September 10, 1879, the complainant objects for the reasons heretofore stated and for the further reason that the witness while — examined has before him various books and memoranda, and does not purport to give his recollections of the facts independent of such books and memoranda.

(Question read.)

A. Now, as to item No. 3, \$321.54. I purchased in the name of L. B. Tichener, at a tax sale on October 19th, 1876, lot 2 for \$233.14; lot 4 for \$88.40, for the taxes of 1875.

Mr. HARBERT:

Q. What taxes?

A. For the State, county, and city taxes of 1875 and State and county taxes of 1873 and '4, making a total of \$321.54.

Mr. WEAN:

384 Q. That is without any commission?

A. That is straight in for taxes without any commission. The certificates of sale we turned over, assigned to Union Mutual Life Insurance Co. This would be under the first contract, but by the first contract the company were not to pay me except where I adjusted with the owners of the property and got the money from them.

Q. Now, the next item.

A. Item No. 4, \$21.51, is for the first Lincoln Park assessment. I cannot give the date of payment, but the company paid me for the receipt on November 25, 1876.

Q. Was that under the first or second contract?

A. Under the first contract, and they paid me the face of it.

Mr. WEAN:

Q. Now, the next item.

A. Item No. 5, \$17.11, I purchased in my own name August 21, 1877, both lots for the second installment of Lincoln Park assessment, and the company paid me for the certificates, which were assigned and delivered; also 5 % commission for buying at the sales.

Counsel for complainant objects to any testimony in regard to commissions paid, because the same is immaterial.

Q. Now as to item No. 6.

A. Item No. 6, \$78.25, was for the following: August 23, 1877, I purchased in the name of L. B. Tichenor at tax sale, for special No. 1963, lot 2 for \$21.08, and special No. 1919, lot 4 for \$34.26, 385 and special No. 1935, lot 4, \$14.00, and special No. 1950, lot 4, \$8.91. The certificates issued on this sale I turned over assigned to the Union Mutual Life Insurance Company and received from it \$78.25, together with 5 % commissions for purchase at sale on October 11, 1877.

Same objection as heretofore as to commissions, and as to all subsequent testimony in regard to commissions same objection, by consent, is to apply.

Q. Now as to item No. 7.

A. On October 4, 1877, I purchased lot 2 for \$107.30 and lot 4 for \$55.73 for the State, county, and city taxes of 1876, being total, \$163.03. On the 13th day of October, 1877, I turned over to the company the certificates assigned in blank, and on the 16th day of October, 1877, the company paid me therefor the sum of \$163.03, together with 5 % commissions in payment of services at sale.

Q. Now as to item No. 8.

A. Now as to the 8th item. On October 11, 1877, I purchased in the name of L. B. Tichenor lot 2 for \$65.05 and lot 4 for \$52.70, a total of \$117.75, for the State and county taxes of 1872, and October 20th, 1877, I turned over the certificates assigned in blank to the company, and received therefor the face, \$117.75, together with 5 % commissions for my services in buying the same. I received the money on the 22nd.

Mr. HARBERT: As to these several tax payments and certificates, they are further objected to on the ground that they represent illegal and unauthorized taxes.

Mr. WEAN: The next item is charged for abstract of title, which Mr. Hamilton has nothing to do with. We will either pass it, or I will introduce voucher right here.

Mr. HARBERT: Better introduce it.

Mr. WEAN: I offer in evidence a receipted bill of Handy, Simmons & Co. for \$85, dated February 21, 1878. I propose to identify this receipt by offering the number on the abstract, 31053, being the same number as appears on the receipted bill and covering the property in question.

Receipted bill offered in evidence and marked Def't's Exhibit 3, Holway.

Q. No. 10 is omitted for the present. Take No. 11.

A. As to No. 11, I purchased in the name of William Mills, at tax sale on September 6, 1878, the lots for the third installment of Lincoln Park assessment for \$16.56, and on October 9, 1878, I turned the certificates assigned over to the company upon the payment by it to me of \$16.56, together with 5 % commissions on the same. I was paid at that date, October 9, 1878.

Q. Now as to No. 12.

A. As to item No. 12, will say that on October 24, 1878, I purchased in my own name the lots for the State, county, and city taxes of 1877, together with the taxes of 1871 on lot 2, paying therefor the sum of \$212.32.

Mr. HARBERT:

387 Q. Can you separate those items?

A. \$152.70 was for the State, county, and city taxes of 1877, and \$58.69 being for the 1871 taxes, and the balance, 93 cts., cost of sale, making a total of \$212.32.

On the 6th day of November, 1878, I turned the certificates over, assigned in blank to the company, and received therefor the sum of \$212.32, and my commissions at 5 % for buying.

Mr. WEAN:

Q. Now as to No. 13.

A. As to No. 13, on Sept. 24, 1878, I purchased in my own name the lots for the city taxes of 1873 and 1874 for \$219.24. On November 22, 1878, I turned the certificates, assigned in blank, over to the company, receiving from it the sum of \$219.24 at that date, together with 5 % commissions to myself for services.

Q. The next is No. 14, August 11, 1879, tax deed, \$151.31.

A. As to No. 14, I purchased from the city comptroller tax title from the city of Chicago, a tax deed to the city of Chicago from the county of Cook, dated April 12, 1877, for the city taxes of 1872, amounting to \$127.98, and I paid the city comptroller the price charged, \$151.31. I received from the Union Mutual Life Insurance Co. on the 11th day of August, 1877, the amount, \$151.31, and commissions at 5 % to myself in additions.

In addition to the objections heretofore made, complainant objects to this item on the ground that it shows an expenditure unauthorized in amount, and for the further reason that the pretended tax-deed title was based upon a tax levy which was illegal and void, and so held by decree of the county court of

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Cook county, Illinois, entered March 19, 1880, and also annulled and set aside by the supreme court.

Q. Now as to No. 45.

A. Now as to No. 45, I purchased in the name of H. C. Bates, on October 16th, 1885, the west 25 feet of the east 50 feet of lot 2, for special assessment warrant 3708, for \$33.66, and on the same day I purchased in the name of H. C. Bates, for special assessment warrant 5959, the east 20 feet of the north 36 feet of said lot 2 for \$22.16; on the 15th day of October, 1885, I purchased for the 10th installment Lincoln Park assessment, lots 2 and 4, for \$12.69, making a total of \$68.51, and on the 29th of October, 1885, I turned the certificates over, assigned in blank, to the Union Mutual Life Insurance Company, and it paid me \$68.51 and \$3.42 as my commissions of 5%, the payment to me being made November 6th, 1885.

Counsel for complainant objects to the item of commissions on the ground stated before, there being no occasion for the payment of commissions, and to the payment of the foregoing items for assessment, for the reason that the certificates were without value, in that they represent in the first instance only the east
389 501st, the second, the east 1,001st, and the next, the east one-vigintillionth of the property.

Q. Your books show these amounts as you have sworn to, do they not?

A. Yes, sir.

Objected to as immaterial.

Q. Are these books open to inspection as to these amounts?

A. If you ask that question that way, I should say no.

Q. Are they here today open to counsel?

A. Yes, sir. I have no present interest in the title of these two lots. Anything that my books show pertaining to these two lots are open for inspection.

Cross-examination.

By Mr. HARBERT:

Q. Do you hold claim upon or title to this property or any part of it acquired in the interest of the defendant herein, The Union Mutual Life Insurance Company?

A. No, sir; I have none.

Q. You have transferred all interests to under taxes, tax titles, and claims acquired either in your name or in the name of any one else on this property to the company?

A. If you modify it to tax titles, yes, sir.

Q. Who was Mr. L. B. Tichenor? Is he alive?

A. No, sir. He was my book-keeper and cashier for a number of years.

390 Q. Who is William Mills?

A. He is in my employ as book-keeper.

Q. Who is H. C. Bates?

A. He was an employ- of mine.

Q. And bought for you?

A. Yes, sir.

Mr. WEAN: In regard to this item of \$15.50 that Mr. Mills or Mr. Hamilton cannot find, I suppose you will be satisfied to let it go in on the same basis as the other.

The WITNESS: I cannot tell you what it is. I think it is for cost of deeds.

Mr. HARBERT:

Q. Then I understand that you neither hold or control any interest, claim, or title acquired for or on behalf of the Union Mutual Life Insurance Company as affecting this property?

A. Not that I know of.

Q. And if there is any such title or claim, I understand you hold it in their interest?

A. Yes, sir.

Adjourned to 3 p. m.

OFFICE OF MASTER IN CHANCERY BOYESEN,
June 30th, 1891—three o'clock p. m.

Met pursuant to adjournment.

Present: Same as before.

391 Mr. WEAN: I find here that we have one item that I did not call Mr. Hamilton's attention to. I find the tax receipt is in Mr. Hamilton's name. Have you any objection to that, Mr. Harbert?

Mr. HARBERT: No objection to it upon that ground. Counsel for defendant offers in evidence a special assessment receipt dated Sept. 2, 1879, to D. G. Hamilton for \$125.59, for special assessment No. 3152, in the town of North Chicago, for paving Rush street, on property described as Canal Trustees' subdivision of the south fractional of section 3, town. 39, range 14, lot 2, block 21; assessment, \$125.37; costs, 22 cts. Receipted by S. H. McCrea, Co. collector, said receipt being offered under item No. 15 of statement of account of defendant and marked "Def't's Ex. 4, Holway."

Mr. GROSSCUP: The tax referred to in the above receipt was paid by the defendant, the receipt being taken in the name of D. G. Hamilton.

Mr. HARBERT: The statement is taken as equivalent to evidence to that effect, but the sufficiency of the payment is subject to the objections heretofore made.

Mr. Wean, of counsel for defendant, hereupon offered in evidence the following:

392 Item 16. Lincoln Park assessment receipt, dated Chicago, April 25th, 1880, showing payment by Union Mutual Life Ins. Co. of \$14.65 for 5th installment of Lincoln Park assessment; lot 2, \$10.47; lot 4, \$4.18.

(Signed)

W. T. JOHNSON,
Co. Collector.

Marked Def't's Ex. 5, Holway.

Item 17. Tax receipt, dated April 27, 1881, for \$166.84, for taxes of 1880—lot 2, \$125.63; east 59 feet of the south 16 feet of lot 4, \$13.73; except the east 59 feet of the south 16 feet of lot 4, \$27.48.

(Signed)

W. T. JOHNSON,

Co. Collector.

Marked Def't's Exhibit 6, Holway.

Item 18. Lincoln Park assessment receipt, dated April 27th, 1881, for 6th installment:

Lot 2.....	\$10 07
Lot 4.....	4 02

Total.....	\$14 09
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(Signed)

W. T. JOHNSON,

Co. Collector.

Marked Def't's Ex. 7, Holway.

Item 19. Receipt for cash paid to Haddock Villette & Ricords, being order No. 36488, \$40.00; receipt withdrawn by agreement.

Item 20. Receipt of O. W. Barrett & Co., dated May 4, 1881, for \$12.00, for insurance on dwelling, Rush & Pearson Sts., Continental Ins. Co. policy No. 29385 for \$2,000; rate, 40 cts.

Marked Def't'- Ex. 8, Holway.

Item 21. Receipted bill, dated Oct. 20, 1881, from G. F. Whidden to defendant, for \$35.00, for 39 ft. sidewalk 12 ft. wide, 9 ft. high on Pine St.

393 Marked Def't'- Ex. 9, Holway.

Objected to by counsel for complainant as not identifying the location of the sidewalk, and for the reason that no necessity has been shown for its construction, and for the further reason that in defendant's statement there appear to be very many claims for the construction of sidewalks in front of property in question.

Item 23. Tax receipt, dated May 1, 1882, for State, county, and city, town, school, road, park, and corporation taxes of 1881:

Lot 2.....	\$124 02
East 59 feet of S. 16 ft., lot 4.....	13 58
Except east 59 ft. of S. 16 ft., lot 4.....	27 14

Total.....	\$164 74
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(Signed)

W. T. JOHNSON,

Co. Collector.

Added in pencil, \$4.12; total (in pencil), \$168.86.

Marked Def't'- Ex. 10, Holway.

Mr. HARBERT: There is a great deal more added in pencil.

Mr. WEAN: We will put in what we want, and you can put in the balance.

Mr. HARBERT: This receipt is objected to because it shows many.

other pencil marks besides the ones specified and shows on its face that the pencilling is no part of the receipt.

Item 24. Lincoln Park assessment receipt, dated May 1, 1882, for the seventh installment:

Lot 2	\$9 68
Lot 4	3 86

(In pencil:) Costs	\$13 54
	34

\$13 88

(Signed)

W. T. JOHNSON,
Co. Collector.

Marked Def't'- Ex. 11, Holway.

Same objection as before.

Item 25. Receipted bill of O. W. Barratt & Co., dated Oct. 21, 1882, showing payment, among other items, of \$8.00 premium on account of insurance on dwelling corner Rush and Pearson Sts.

Exhibit withdrawn by agreement; not marked.

Item 26. Receipted bill, dated Oct. 16, 1882, for \$100 for quit-claim deed from E. F. Comstock and Geo. W. Stanford.

(Signed)

E. F. RUNYAN.

Marked Def't'- Ex. 12, Holway.

This item objected to by counsel for complainant for the reason that it does not appear that there was a necessity for the expenditure, nor that the amount was reasonable.

Item 27. Receipted bill, dated Mar. 26, 1883, for \$200 for general repairs per contract, Rush and Pearson Sts.

(Signed)

G. F. WHIDDEN.

395 Marked Def't'- Ex. 13, Holway.

Objected to by counsel for complainant for the reason that the contract is the best evidence of the work done and the reasonableness of the bill, and that it neither appears that there was a necessity for the repairs or what the repairs consisted of.

Item 28. Tax receipts, dated May 1, 1883, for general taxes for 1882, lot 2, \$138.29.

(Signed)

W. C. SEIFF, *Co. Col.*

Added in pencil: Costs, \$3.46—\$141.75.

Marked Def't'- Ex. 14, Holway.

Items \$3.46 and \$141.75 in pencil are objected to by counsel for complainant for the reason that they are private memoranda and in explanation.

Item 29. Tax receipt, dated May 13, 1883, for general taxes — 1882, lot 4, \$71.19, receipted by W. C. Seip, Co. coll.

Added in pencil : \$1.78—\$72.97.

Marked Def't'- Ex. 15, Holway.

Receipt objected to by counsel for complainant on the grounds that it appears to have been tampered with and added to, and the amount in pencil is evidently no part of the receipt.

The MASTER: In so far as the letters and numbers in ink are concerned, the receipt is admitted; in so far as the pencil memoranda are concerned, same not admitted as evidence, except as sustained by further explanation; this same ruling to apply to all receipts which appear to be marked in pencil, and not as a part of the official receipt of the collecting officer.

Item 30. Lincoln Park assessment receipt, dated May 1-3, 1883, for 8th installment, lot 2, \$9.28.

(Signed)

W. C. SEIPP, *Co. Coll.*

Added in pencil : Costs, 23 cts.—\$9.51.

Marked Def't'- Ex. 16, Holway.

Mr. HARBERT: I ask that the pencil marks be omitted from the record.

Counsel for defendant -hereupon decided to make the offer of the exhibits which follow and have same marked by stenographer and withdrawn.

Item 31. Lincoln Park assessment receipt, dated May 1, 1883, for 8th installment Lincoln Park assessment, lot 4, \$4.12.

(Signed)

W. C. SEIPP, *Co. Coll.*

Marked Def't'- Ex. 17, Holway.

Item 32. Receipted bill of O. W. Barrett & Co., dated Nov. 8, 1883, showing a payment of \$15.00 for insurance in Continental Ins. Co. Withdrawn by consent; not marked.

Item 33. Receipt for water supply, dated July 12, 1883, for \$60.50, covering period from Nov., '79, to May, '82, signed by John W. Lyons, cash., W. S. Maher, registrar.

Marked Def't'- Ex. 18, Holway.

This item, \$60.50, is objected to by counsel for complainant on the ground that the presumption is that the tenant should pay the water taxes, and there is no showing to the contrary.

Item 34. Tax receipt, dated April 28, 1884, for general taxes of 1883 on lot 2, \$175.22.

(Signed)

W. C. SEIPP, *Co. Coll.*

Marked Def't'- Ex. 19, Holway.

Item 35. Tax receipts, dated April 28th, 1884, general taxes of 1883 on lot 4, \$48.24.

(Signed)

W. C. SEIPP, *Co. Coll.*

Marked Def't'- Ex. 20, Holway.

Item 36. Lincoln Park assessment receipt, dated April 28, 1884,
9th installment, lot 2, \$8.88.

(Signed)

W. C. SEIPP, *Co. Coll.*

Marked Def't'- Ex. 21, Holway.

Item 37. Lincoln Park assessment receipt, dated April 28, 1884,
9th installment, lot 4, \$3.55.

(Signed)

W. C. SEIPP, *Co. Coll.*

Marked Def't'- Ex. 22, Holway.

Item 38. Receipted bill, dated June 9, 1884, for \$40.32 for material
and labor in constructing 6-foot walk on Pearson St., S. E. corner of
Rush, 144 feet, at 28 cts.; receipted by W. F. Hair.

Marked Def't'- Ex. 23, Holway.

Item 39. Receipted bill of O. M. Barrett & Co. showing payment
of \$15.00 on account of insurance, Continental Ins. Co.; amount,
\$2,000; rate, 75 cts.

398 Withdrawn by consent; not marked.

Item 40. Receipted bill, dated Mar. 21, 1885, for \$55.00 for
making a new roof and gutter at Kirchoff's barn, corner Rush and
Pearson Sts., as per agreement; receipted by Joseph Poitras.

Marked Def't'- Ex. 24, Holway.

Objected to by counsel for complainant because it does not appear
that the work was necessary or that the bill is reasonable, and the
contract is the best evidence.

Item 41. Tax receipt, dated April 25th, 1885, for the general taxes
of 1884:

Lot 2	\$176 84
East 59 feet of the south 16 feet of lot 4	30 36
Except east 59 ft. of S. 16 ft., lot 4.	18 20
	<hr/>
	\$225 43

(Signed)

W. C. SEIPP, *Co. Coll.*

Marked Def't'- Ex. 25, Holway.

Item 42. Letter dated June 24, 1885, to William Penny.

(Signed)

P. W. NILSON.

Marked Def't'- Ex. 26, Holway.

This epistle is objected to by counsel for complainant as incom-
petent, irrelevant, and immaterial; secondly, fails to identify the
time, place, person, property, and has no relation to this case.

Item 43. Receipted bill for water supply, marked paid, August
28, 1885, for \$11.25, covering period from May, 1884, to
399 May, 1885; signed by John W. Lyons, cashier; W. S. Maher,
registrar.

Marked Def't'- Ex. 27, Holway.

Same objection by counsel for complainant as to the other water bill.

Adjourned to 10.30, July 1st, 1891.

JULY 1ST, 1891—10.30 a. m.

Met pursuant to adjournment.

Present: Same as before.

Item 44. Receipted bill of O. W. Barrett & Co., dated October 16th, 1885, showing payment of \$15.00 for premium on insurance policy for \$2,000—rate, 75 cents—in Continental Ins. Co., on dwelling corner Rush and Pierson streets.

Exhibit withdrawn by consent; not marked.

Item 46. Receipted bill, dated November 27th, 1885, for \$12.00 for 45 feet large gutter on barn corner Rush and Pierson streets; receipted by C. W. Ferguson.

Marked Def't'- Ex. 28, Holway.

Objected to by counsel for complainant on the ground that there is no showing of a necessity for the improvement.

Item 47. Tax receipt, dated April 15, 1886, for the general taxes of 1885 on lot 2, \$181.60.

(Signed)

W. C. SEIPP, *Co. Coll.*

400 Marked Def't'- Ex. 29, Holway.

Item 48. Tax receipt, dated April 15, 1886, for the general taxes for the year 1885:

East 59 feet, etc., lot 4.	\$31 22
Balance of lot 4.	18 73
	<hr/>
	\$49 95

(Signed)

W. C. SEIPP, *Co. Coll.*

Marked Def't'- Ex. 30, Holway.

Item 49. Lincoln Park assessment receipt, dated April 15, 1886, for 11th installment, lot 2, \$8.08.

(Signed)

W. C. SEIPP, *Co. Coll.*

Marked Def't'- Ex. 31, Holway.

Also under item 49, Lincoln Park assessment receipt, dated April 15th, 1886, 11th installment lot 4, \$3.23.

(Signed)

W. C. SEIPP, *Co. Coll.*

Marked Def't'- Ex. 32, Holway.

Item 50. Special assessment receipt, dated June 3rd, 1886, for special assessment number 6047, for curbing, grading, *grading* and paving Pierson St.:

Lot 2.....	\$463 86
Costs.....	03
	<hr/>
	\$463 89

(Signed)

W. C. SEIPP, *Co. Coll.*

Marked Def't'- Ex. 33, Holway.

401 Item 51. Special assessment receipt, dated June 3, 1886, for special assessment number 6047, for curbing, grading, and paying Pierson St., lot 4, \$10.03.

(Signed)

W. C. SEIPP, *Co. Coll.*

Marked Def't'- Ex. 34, Holway.

On the two exhibits last described appear rebates as follows :

Lot 2.....	\$128 43
Lot 4.....	2 00
	<hr/>
	\$130 43

Being the amount charged in item number 8, "Defendant's statement of receipts."

Item 52. Receipt- bill of O. W. Barrett & Co., dated October 1st, 1886, showing payment by the Union Mutual Life Ins. Co. of \$15.00, premium for insurance policy in Continental Ins. Co. for \$2,000—rate, 75 cents—on dwelling corner Rush and Pierson Sts.

Exhibit withdrawn by consent; not marked.

Item 53. Tax receipt, dated May 2-3, 1887, for general taxes for year 1886, lot 2, \$182.92.

(Signed)

GEORGE R. DAVIS, *Co. Coll.*

Marked Def't'- Ex. 35, Holway.

Item 54. Tax receipt for State, county, and city taxes of 1886, number 12058, east 59 ft. of S. 16 ft., lot 4 :

401½ Taxes.....	\$31 58
Costs.....	41
	<hr/>
Total taxes and costs...	\$31 99
Interest.....	1 90
	<hr/>
Total amount of sale.....	\$33 89

Dated October 8, 1887. Signed Henry Wulff, clerk county court; countersigned George R. Davis, treasurer; sold to H. C. Bates; endorsed in blank by H. C. Bates.

Marked Def't'- Ex. 36, Holway.

Also tax certificate for city, county, and State taxes of 1886, number 12059, except the east 59 ft. of the S. 16 ft. of lot 4 :

Taxes of 1886.....	\$18 97
Costs.....	41
Total taxes and costs.....	\$19 38
Interest.....	1 14
Total amount of sale.....	\$20 52

Sold to H. C. Bates, October 8, 1887. Signed Henry Wulff, clerk county court; countersigned George R. Davis, treasurer; endorsed in blank by H. C. Bates.

Marked Def't'- Ex. 37, Holway.

The tax certificates above mentioned to be surrendered by defendant upon redemption.

These two last tax certificates and all tax certificates introduced and hereafter to be introduced, if any, are objected to by
402 counsel for the complainant, except in so far as they amount to the payment of taxes, on the ground that it was the duty of the defendant to have paid the taxes without cost to complainant.

Item 55. First, Lincoln Park assessment receipt, May 2-3, 1887, for 12th installment, lot 4, \$3.07.

(Signed)

GEO. R. DAVIS, *Co. Coll.*

Marked Def't'- Ex. 38, Holway.

Second, Lincoln Park assessment receipt, dated May 2-3, 1887, for 12th installment, lot 2, \$7.69.

(Signed)

GEO. R. DAVIS, *Co. Coll.*

Marked Def't'- Ex. 39, Holway.

Item 56. Receipt of F. W. Lamb & Co., dated April 25, 1887, 12 hours, mason and helper, at 80 cents, \$9.60.

Marked Def't'- Ex. 40, Holway.

This voucher objected to by counsel for complainant on the ground that it shows nothing with respect to the expenditure of the money; it neither identifies the property nor specifies the amount of work, nor is it accompanied by any of the evidence showing that the work was necessary nor that the payment for the work was reasonable.

Mr. WEAN: We expect to prove by the agent who had charge of the premises the matters referred to in the above objection.

403 Item 57. Receipted bill, dated July 1st, 1887, for one-half of \$24.46, receipted by A. C. Hicky, for material and labor on sewer—"rep. and putting in sewer pipe in ground, Rush and Pierson Sts."

Marked Def't'- Ex. 41, Holway.

That is objected to by counsel for the complainant on the ground that it is not shown to be necessary or that the bill is reasonable or that the work was done.

Item 58. Receipted bill of O. W. Barrett & Co., dated October 19,

1887, showing payment of \$15.00 for premium on insurance policy in Continental Ins. Co. for \$2,000; rate, 75 cents; corner Rush and Pierson Sts.

Exhibit withdrawn by consent; not marked.

Item 59. Receipted bill, dated November 22nd, 1887, for \$18.76, for laying sidewalk corner Rush & Pierson streets, 67 feet, at 28 cents a foot; receipted by Jos. Poytras.

Marked Def't'- Ex. 42, Holway.

Objected to by counsel for the complainant on the ground that it is not shown that the expenditure was necessary, nor that the amount paid therefor was reasonable, nor that the work was done.

Item 60. Tax receipt, dated April 11th, 1888, for the general taxes for the year 1887 on—

Lot 2	\$182 06
Lot 4	50 28
	<hr/>
	\$232 34

404 (Signed)

GEO. R. DAVIS, *Co. Coll.*

Marked Def't'- Ex. 43, Holway.

Item 61. First, certificate of sale No. 240, 13th installment Lincoln Park assessment:

Amount 13th installment.....	\$5 69
Interest on deferred installments ...	1 60
Costs.....	41
	<hr/>
	\$7 70

Lot 2, sold to H. C. Bates October 8, 188—. Signed Henry Wulff, clerk of Co. court; countersigned Geo. R. Davis, treasurer; endorsed in blank by H. C. Bates.

Marked Def't'- Ex. 44, Holway.

Second. Certificate of sale No. 241, 13th installment Lincoln Park assessment:

Amount of 13th installment..	\$2 77
Interest on deferred installments	64
Costs.....	41
	<hr/>
	\$3 32

Lot 4, sold to H. C. Bates October 8th, 1888. Signed Henry Wulff, clerk Co. court; countersigned Geo. R. Davis, treasurer; endorsed in blank by H. C. Bates.

Marked Def't'- Ex. 45, Holway.

The above certificates of sale to be surrendered by defendant upon redemption.

405 These certificates are objected to by counsel for the complainant as to former ones.

Item 62. Receipted bill of O. W. Barret & Co., dated October 20, 1888, showing payments by the Union Mut. Life Ins. Co. of \$20.00 premium on insurance policies in Continental Ins. Co., \$1,000; rate, 1 %; Merchants' Ins. Co., \$1,000; rate, 1 %; building Rush and Pierson Sts.

Exhibit withdrawn by consent; not marked.

Item 63. Receipted bill, dated April 1st, 1889, for repairing walk corner Rush and Pierson Sts., \$12.00. Receipted by F. J. French.

Marked Def't's Ex. 46, Holway.

Same objection by counsel for complainant as to other pretended repairs.

Item 64. Tax receipt, dated April 26, 1889, for general taxes, year 1888:

Lot 2	\$186 07
Lot 4	51 36

Total	\$237 43
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(Signed) GEO. R. DAVIS, *Co. Coll.*

Marked Def't'- Ex. 47, Holway.

Item 65. Special assessment receipt, dated April 26, 1889, for special assessment No. 8871, for curbing, grading, and paving Tower place, lot 4, \$125.71.

(Signed) GEO. R. DAVIS, *Co. Coll.*

406 Marked Def't'- Ex. 48, Holway.

Item 66. Special assessment receipt, dated April 26, 1889, for special assessment No. 9232, for sidewalk on Pierson St., lot 2, \$43.20.

(Signed) GEO. R. DAVIS, *Co. Coll.*

Marked Def't'- Ex. 49, Holway.

Item 67. Special assessment receipt, dated April 26, 1889, for special assessment No. 9266, for grading and paving Rush St., lot 2, \$166.32.

(Signed) GEO. R. DAVIS, *Co. Coll.*

Marked Def't'- -- 50, Holway.

Item 68. Lincoln Park assessment receipt, dated April 26, 1889, for the 14th installment:

Lot 2	\$6 89
Lot 4	2 75

\$9 64

(Signed) GEO. R. DAVIS, *Co. Coll.*

Marked Def't'- Ex. 51, Holway.

Item 69. Receipted bill, dated August 31, 1889, for \$20.00, for

repairing roof corner Rush and Pierson Sts.; receipted by F. J. French.

Marked Def't'- Ex. 52, Holway.

Same objection by counsel for complainant as to other bills for repairs.

Item 70. Receipted bill of O. W. Barrett & Co., dated April 1st, 1889, showing payment by Union Mutual Ins. Co. for insurance on building corner Rush and Pierson Sts.—Continental Ins. Co. policy \$1,000, rate 1 %, \$10.00; Merchants' Ins. Co., amount \$1,000, rate 1 %, \$10.00; total, \$20.00.

Exhibit withdrawn by consent; not marked.

Item 71. Tax receipt, dated April 21, 1890, general taxes of 1889 :

Lot 2.....	\$192 04
Lot 4.....	52 98
	<hr/>
	\$245 02

(Signed)

GEO. R. DAVIS, *Co. Coll.*

Marked Def't'- Ex. 53, Holway.

Item 72. Lincoln Park assessment receipt, dated April 21, 1890, for 15th installment :

Lot 2.....	\$6 49
Lot 4.....	2 59
	<hr/>
	\$9 08

(Signed)

GEO. R. DAVIS, *Co. Coll.*

Marked Def't'- Ex. 54, Holway.

Item 73. Receipted bill of O. W. Barrett & Co., dated October 1st, 1890, showing payment by Union Mutual Life Ins. Co. for insurance on building Rush and Pierson Sts. :

Continental, \$1,000, rate 1 %	\$10 00
Merchants', \$1,000, rate 1 %.....	10 00
	<hr/>
Total....	\$20 00

Exhibit withdrawn by consent; not marked.

408 Item 74. Receipted bill, dated September 12, 1890, for building 146 feet sidewalk on the south side Pierson St., in front of lot 2, at 26 cents per foot, \$37.96; receipted by Bieson & Wheeler.

Marked Def't'- Ex. 55, Holway.

Same objection by counsel for complainants as to other bills for repairs and improvements.

Item 75. Tax receipt, dated April 28th, 1891, for general taxes, year 1890:

Lot 2.....	\$220 20
Lot 4.....	60 78
Total.....	\$280 98

(Signed)

CHARLES KERN, *Co. Coll.*

Marked Def't'- Ex. 56, Holway.

It is stipulated by and between counsel that items No. 9 for \$85 and No. 19 for \$40 are correct and are to be allowed without objection.

It is agreed by and between counsel that the records in the Federal court show, among other things, that on December 1st, 1880, E. A. Warfield, as receiver, had in his hands on his final report a balance of \$148.16, and that James H. Gallery, his successor, as receiver, had on his final report on April 9, 1881, a balance in his hands of \$97.90, and that James R. Page, receiver, successor to said Gallery, on his final report, had in his hands on August 1st, 1882, a balance of \$9.12, and that James R. Page was the last receiver in said cause, and that the said reports purport to be a full account of their receipts and disbursements on account of said property, and that their appointment as receiver required them to collect the rents of said property and to pay taxes, insurance, etc., on the same, and that the said reports were confirmed by the court and their appointment and their reports and confirmation were, in the case of *The Union Mutual Life Insurance Co. v. Elizabeth Kirchoff and Julius Kirchoff et al.*, after the foreclosure of these premises.

Counsel for defendant states that matters appearing in said report to have been paid by receivers are nowhere duplicated in the statement of expenses filed in the defendant's statement before the master.

Adjourned to 2.30 p. m.

2.30 P. M., JULY 1ST, 1891.

Met pursuant to adjournment.

Present: Same as before.

Adjourned to Monday, July 6th, 2 o'clock p. m.

STATE OF ILLINOIS, }
County of Cook, } ss:

In the Circuit Court of Cook County.

KIRCHOFF

vs.

THE UNION MUTUAL LIFE INSURANCE CO. }

410

WEDNESDAY, July 8, 1891—2 o'clock p. m.

Met pursuant to adjournment.

Present: Same as before.

WILLIAM PENNY, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By F. L. WEAN:

Q. Give your name, age, residence, and occupation.

A. William Penny; 63; real estate.

Q. You reside in Chicago.

A. Reside in Chicago.

Q. How long have you resided in Chicago?

A. Seven and a half years.

Q. During that time what has been your relation with the Union Mutual Life Insurance Co.?

A. I have been agent for the real estate; collecting agent and renting agent for all the real estate.

Q. As such agent did you have charge of the premises known as the Kirchoff homestead?

A. Yes.

Q. When did you commence collecting rents from this Kirchoff property?

411 A. February 18, 1884.

Q. Examine the paper I show you and state what it is.

A. This is a correct statement from my books.

Q. Of what?

A. Of rents collected from 1883 up to April, 1891, inclusive.

Statement in question offered in evidence by counsel for defendant and marked "Def't's Ex. 57."

Mr. HARBERT: This is not objected to. It is agreed that Mr. Penny's books will show these collections for that period, but objection is made to the testimony as insufficient to bind the complainant—not in matter of form, but in matter of substance.

Mr. WEAN:

Q. You may describe the property rented—for which you collected these rents.

A. It is on the corner of Rush and Pierson Sts.—a two-story brick building, which is used as a laundry, and a barn. The barn was burned. It was in a dilapidated state.

Q. Both the house and barn?

A. No; the barn.

Q. What about the house?

A. The house is a laundry—used as a laundry. That is not in a very good shape.

Q. Was it when you took charge of the property?

A. Rather better today than it was then—quite as good, anyway.

I don't think it was changed much.

412 Q. How old is the house?

A. I couldn't tell. It was an old place when I took hold of it—seemed to be a very old place—twenty years old, I should think.

Q. You speak of the barn having been burned. Can you tell about when this took place?

A. Four years ago.

Q. Have you collected as rent for those premises all it was possible to do under the circumstances?

Objected to as leading.

Q. Did you rent the premises to the best advantage you knew how to do?

(Same objection.)

A. I firmly believe I did.

Q. What efforts did you make to obtain tenants for the property?

A. The same tenant practically was in when I took hold until last year, and then he re-rented it. He found a man to take it up.

Q. Did you believe that he was paying all the rent the property was worth?

A. I think so.

Objected to as immaterial.

Q. Have you ever made any repairs or had any repairs made upon the property?

A. I made a few repairs, but I have made as few as possible. I fixed the roof, fixed the sidewalk, and did a few things we could not do without.

413 Q. We have offered in evidence several vouchers showing expenditures for repairs of sidewalk. What can you state as to the necessity for those repairs?

Objected to as being an "omnibus" question.

The MASTER: I think what he knows as to the reason and necessity for the repairs is competent.

A. There was no sidewalk at all, as far as my recollection goes, when I took hold of the agency. Then the police reported us, and the neighbors, and the man in charge—the man who rented the place, Mr. Wilson.

Q. Did you ever receive any notice from the city?

A. Twice.

Q. Did you ever build a walk without receiving notice from the city?

A. I think the first I built. I am not quite sure whether I had a notice from the city or whether I did it myself. The first time it was fixed by Mr. Hare, I think.

Q. Did you contract for the repairs in advance?

A. Most of the work; I think all of it. I would not swear, but I think all of it.

Q. Were the bills rendered you for these repairs as reasonable as you could have obtained or had the work done?

A. I don't think I could have had it done cheaper and as well anywhere else.

The MASTER :

414 Q. Did you represent any other property of the company or considerable amount of property of the company in the city, Mr. Penny ?

A. Yes, sir.

Q. Did you use the same precaution in the same measure in reference to this property as you did to other property ?

A. Exactly ; didn't know any difference.

Q. As property owned by the company ?

A. I looked upon it as being property owned by the company—absolutely owned by the company. I had no idea it was otherwise until just recently.

Mr. WEAN :

Q. What compensation have you received for collecting these rents ?

Objected to as immaterial.

A. Up to January 1, 1888, there was no particular compensation in connection with this. They were all thrown in on salary ; therefore it was thrown in upon a salary ; but since January, 1888, I have been upon five per cent. upon everything I have collected, no matter what.

Q. Is that a reasonable commission for collecting rents ?

Objected to, first, on the ground that it is immaterial, and, secondly, because it is not shown that he is competent to testify on the subject.

A. That is a reasonable commission.

Cross-examination.

By Mr. HARBERT :

415 Q. Can you enumerate what repairs were made upon this property during the time you had charge of it ?

A. I cannot.

Q. Do you know how much was spent for sidewalk building and repairs ?

A. I can't tell.

Q. Do you know how much was spent for other repairs—repairing roof and the like ?

A. I can't tell.

Q. Do you know how many items of repairs were paid by you—how many bills for repairs were paid by you—during the time you had charge of the property ? Did you pay the bills or were they paid by the company ?

A. They were paid mostly by me, but more often a remittance from the company to myself, to be handed over to the party to whom it was going.

Q. You are unable, then, to state the amount ?

A. I am unable to state the amount.

Q. And your attention has not been specifically called in this examination to the bills, has it?

A. That is so.

Q. Do you know more than one piece of property known as the Kirchhoff property?

A. I don't know of any other property called the Kirchhoff property, only the lower part of the same square, the vacant property.

Q. You never rented the vacant property?

416 A. No.

Q. You never attempted to rent that?

A. I have. I can't just remember what time. I have once or twice when I thought something was thrown up, that it was probable that I might rent it. I cannot exactly say what time it occurred to me.

Q. It occurred to you it could have been rented?

A. Just a possibility that there may be a chance of renting it, but I have seen no chance of renting it.

Q. You never made any effort to rent it?

A. Not particular. I never advertised or anything that way; never went particularly out of my way.

Q. You spoke about the barn being burned. Was it burned or scorched?

A. It was burned very considerably.

Q. Was it not afterwards repaired?

A. Only what was done by the tenant.

Q. It was tenantable?

A. I don't suppose it was after the fire, until it was repaired.

Q. But it was repaired by the tenant?

A. By the tenant.

Q. And then it was occupied after that?

A. It was occupied; yes.

Q. Was the rent diminished on account of the scorching?

A. There was no rent at all for a time.

Q. Do you know how long the property was vacant?

417 A. I couldn't tell from memory. I should say a month or two.

Q. Was any of the other property vacant during the time you had charge of it?

A. No.

Q. How large a house was it—that brick house—how many rooms?

A. I can't just exactly say just how many rooms there would be there.

Q. Can you approximate the dimensions of the house?

A. I don't think I can.

Q. Was it as wide as 25 feet?

A. Oh, yes; more than that.

Q. 35 feet?

A. I think it must be 30 feet.

Q. 30 feet wide?

A. I think so; I am not sure.

- Q. How deep?
A. 45 to 50 feet.
Q. How many stories high?
A. Two stories.
Q. And a basement?
A. And a basement—I don't think there was a basement
Q. Either basement or cellar?
A. I don't just remember; I think there is some sort of a cellar;
it just occurs to me there is some sort of a cellar, but it is not very
clear to my mind.
Q. Then the house, you would say, was a two-story and cellar
basement house, about 30 to 35 feet wide?
418 A. Perhaps so.
Q. Well, about 30 feet wide and 45 to 50 feet deep?
A. 45 to 50 feet deep; yes.
Q. What street did it front on?
A. On Rush street.
Q. And the barn fronted on what street?
A. Pierson St.
Q. The barn was in the rear of the house, fronting on the street
cornering with Rush?
A. Yes.
Q. How large was the barn?
A. Maybe about 20 feet, I should think, by 30.
Q. How was that occupied?
A. At the time before the fire it was occupied as a barn.
Q. And how was the brick house occupied?
A. As a laundry.
Q. The whole of it or part of it?
A. Whole of it.
Q. The whole of it as a laundry?
A. The girls working about, you know, was upstairs, and down-
stairs packing up, and all that sort of thing, and the machinery on
the ground floor.
Q. What was the separate rent of the house that you collected?
A. Well, when I took hold the whole thing was rented for \$60.00,
and there was not exactly a difference between one and the
419 other, but I formed in my mind an opinion that the house
was worth \$40.00 and the other was worth about \$20.00.
Q. Was it all rented to one party?
A. Yes.
Q. And did he sublet?
A. I think he did a short time.
Q. How much did he sublet?
A. The barn.
Q. Do you know how much he got for the barn?
A. I think about \$9.00 to \$10.00.
Q. You don't know?
A. I don't know; it was sublet when I took hold.
Q. Do you know whether he sublet the house or any part of it?
A. I guess not.

Q. Was the laundryman?

A. Yes.

Q. When did you cease collecting rents there?

A. About ten days ago.

Mr. WEAN:

Q. You have not ceased, have you, Mr. Penny?

A. No.

Mr. HARBERT:

Q. Have you received rent for this property since the date of this statement?

A. Right to the end of June.

420 Mr. WEAN:

Q. How much rent have you received since then?

A. \$45.00.

Q. What is the last month shown on the statement introduced as "Exhibit 57"?

A. \$42.00.

Q. For what month?

A. End of April. May, June is \$45.00.

Q. What do you mean by "May, June"?

A. \$45.00 per month each.

Q. That makes in all how much received from this statement? How much has been received outside of that statement?

Objected to as immaterial and incompetent.

A. \$90.00.

Mr. HARBERT:

Q. Up to what time would that pay for rent?

A. \$45.00 for one month; the \$90.00 would pay for May and June, 1891.

Mr. WEAN:

Q. Mr. Penny, I will show you vouchers for payment made by the Union Mutual Life Insurance Co. on account of repairs on the Kirchoff premises, marked as Exhibits 23, 24, 26, 28, 41, 42, 46, 52, and 55, and ask you to examine the same and state if you know of the work having been done and the payments having been made and if the bills were reasonable.

A. The ones marked Exhibits 55 and 26 I know nothing about. All the others, the work has all been done, and I think myself that everything has been reasonable.

421 Mr. HARBERT:

Q. I call your attention to Exhibit 23. Was this a good sidewalk that you put down in 1884?

A. It was, probably. I used very strong language to Hare, be-

cause I thought it was not good enough afterwards. After experience, I thought it had gone out too soon.

Q. Do you know when you had to repair that again?

A. It was used up—very considerably used up.

Q. When?

A. When we got to repair it again.

Q. You thought you had paid him too much for it?

A. It wasn't that I paid him too much. I thought it never lasted long enough.

Q. If it had been a good job it would have lasted longer?

A. Yes; I thought it could have lasted longer.

Q. You paid for a good job?

A. We paid for a good job, and I was very sorry it wore out soon.

Q. Did you get a good job?

A. Well, I don't know.

Mr. WEAN:

Q. You did the best you could?

A. Did the best I could. If it had been my own I could not have done better. I would not spend a cent more than if it had been my own.

Mr. HARBERT:

Q. Were these repairs on the roof for the barn or the house,
422 \$20.00?

A. That was for the house—for the laundry. It was raining in every part of it, and it made this man give a guarantee for the twelve months to keep the rain out.

Q. Where are the leases belonging to this property that you gave?

A. The company have them.

Counsel for complainants give notice that he wants the leases in question produced.

Mr. WEAN:

Q. Have you had a new lease made for every year?

A. For every year.

Mr. HARBERT: All this testimony is objected to on the ground that the leases require the tenants to make all necessary repairs.

STATE OF ILLINOIS, }
 County of Cook, } ss:

In the Circuit Court of Cook County.

KIRCHOFF

vs.

THE UNION MUTUAL LIFE INSURANCE CO. }

Office of I. K. Boyesen, master in chancery.

JULY 15TH, 1891—2 o'clock p. m.

423 Met pursuant to adjournment.

Present: Same as before.

GEORGE F. WHIDDEN, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. WEAN:

Q. State your name, age, residence, and occupation.

A. George F. Whidden; 999 Monroe St.; out of business at present.

Q. What has been your business?

A. General contractor.

Q. Contractor in what line of work?

A. General repair of houses—everything.

Q. During what time were you engaged in that business in Chicago?

A. From 1869 to 1888.

Q. Have you ever made repairs for the Union Mutual Life Insurance Company on their property in this city?

A. Yes, sir; a good many.

Q. Where you regularly employed by them?

A. I did a great deal of work for them for about five or six years.

Q. Did you ever do any work on the premises known as the Kirchhoff premises, at the corner of Rush and Pearson streets?

A. Yes, sir.

Q. You may state the character of the work done on this property.

424 Objected to by counsel for complainant as too indefinite, not showing the time when the work was done.

Q. About when did you do the work?

A. I think I shall have to refresh my recollection in regard to it. I was working for them constantly; just when I would not be able to tell.

Q. We have introduced in evidence here a receipted bill for sidewalk on Pine street for \$35.00 as "Exhibit 9." State if you did the work as described.

(Paper handed to witness by counsel.)

A. I have no doubt I did it; that is my signature, bill-head, etc. The circumstances I don't remember. I should think this was evidence—

Objected to.

A. I have no doubt I did the work from this bill.

Q. Did you ever do any work for this company that was not necessary for the good of the premises?

Objected to as incompetent and too general.

A. Not that I am aware of. I did such work as I was ordered to do.

Q. Can you state whether this bill was a reasonable one for the service rendered?

A. In my estimation, it was.

Q. I will show you another receipted bill for \$200.00 on account of general repairs, Rush and Pearson streets, and ask you to state what these repairs were.

A. Well, they have passed out of my memory now. I can tell you all I know about it. I remember going in and seeing an old brick building pretty well run down—sash out, plumbing was gone. I remember that the sash was out, glass and sash, and I remember the floors were in bad shape. I am under the impression that there was a man wanted to occupy it as a laundry, and we had to put the sewer in shape for him; that's about all I remember about it. I would not swear certainly that I was there, but I feel sure I was there and saw what had to be done, and went there for that purpose.

Q. Did you have a written contract with the company or its agent for this work?

A. I think not. It was very seldom I had a written contract. It was simply a memorandum showing the amount of work to do and the price or cost, and when it was done I generally got my money for it.

Q. Was the charge represented by this bill reasonable?

A. I believe it was.

Q. For the work done?

A. Yes, sir; I believe it was.

Cross-examination.

By Mr. HARBERT:

Q. Do you know how many pieces of property the Union Mutual Life Insurance Company was interested in situated on Pine street?

A. I do not.

Q. Have you any recollection at all, independently of this bill, as to where this sidewalk was constructed?

Mr. WEAN: What bill?

Mr. HARBERT: The first one you have referred to.

A. Of the location of the property?

Q. Yes, sir.

A. No; I cannot say that I have. I think it was in the neighborhood of that piece there and the other piece.

Q. There is nothing on here to indicate where it was?

A. I guess not.

Q. You have no recollection as to how the sidewalk was when you approached it?

A. No, sir.

Q. Do you remember the character of the sidewalk, as to whether it was dressed or undressed—anything about it?

A. Only as described in that bill.

Q. That says nothing about that, does it?

A. No, sir; I think not.

Q. Have you any recollection whatever of this sidewalk except from this bill?

A. That's about all I remember, what I see on this bill.

Q. Independently of the bill you have no recollection of it?

A. I should not know anything about it.

427 Q. I now call your attention to the second item to which your attention was called. Can you enumerate the items which entered into that contract?

A. Not at all.

Q. Do you remember whether that contract was in writing or in parole?

A. I think it was in parole.

Q. I call your attention to the word "contract," and ask you now whether that was not in writing.

A. No, sir; not by any means, I should say, because I can hardly remember of a written contract.

Q. Do you remember whether there was any written contract?

A. I would not say. I give here my impression.

Q. I do not ask for your impression. I ask whether you have any recollection about it.

A. No, sir.

Q. Are you clear that there was a contract?

A. From what I see I should say there was, or it would not be there. Sometimes I made repairs without any contract; was sent to do certain work. If I went there and seen that sidewalk with the agent, and he said to do certain work, I would do that work.

Q. You did such work as you were told to do in regard to these matters?

A. Yes, sir.

Q. You had no discretion in the matter?

A. No, sir.

428 Q. You contracted to do certain work and did it?

A. Yes, sir.

Q. It is no part of your business to decide whether it was necessary, proper, or not?

A. No, sir; it was not in that case.

Q. That is all we are asking about. Would it be possible for you

to say that the price of the work done and the materials were reasonable, unless you knew what the work was?

A. It would be possible for me to say that I never made any bill but what I considered it reasonable.

Q. That is true; but in this particular case would it be possible for you to swear it was or was not reasonable, unless you knew what had been done?

A. At this time I cannot remember what was done.

Q. Isn't it true that you made more profit on work sometimes than at other times?

A. I don't get the drift of that question.

Q. In regard to contract work—isn't it true you make a good contract sometimes and come out ahead and sometimes you make a poor contract and come out behind?

A. I believe that is a fact with everybody.

Q. Is there in exception in regard to the contract with the Union Mutual Life Insurance Company?

A. No, sir; I cannot say there is.

Q. Then you cannot say how much you made under this contract?

429 A. I cannot.

Q. Without knowing what the work was or the material used?

A. Unless I had something to refer to—items—I cannot tell how I came out at the present time. I lost money on some of their contracts and made some.

Redirect examination.

By Mr. WEAN:

Q. In regard to this sidewalk on Pine street. Do you say that you know whether this was connected with the other lot or not?

A. No; I do not. My impression is it is in that neighborhood, close there somewhere.

Counsel for complainant objects to his impressions.

Q. You are not at present employed in any way by the Union Mutual Life Insurance Company?

A. No, sir; have not been for three or four years.

Adjourned subject to notice.

STATE OF ILLINOIS, }
County of Cook, } ss :

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE CO. }

430 Office of D. G. Hamilton, 94 Washington St.

2 O'CLOCK P. M., AUG. 17TH, 1891.

Met pursuant to notice.

Present : Mr. Daly, on behalf of plaintiff ; Mr. Wean, on behalf of defendant.

D. G. HAMILTON, a witness, having been previously sworn, was recalled and testified as follows :

Direct examination.

By Mr. WEAN :

Q. You have already been sworn in this case ?

A. Yes, sir.

Q. Have you paid the taxes for the Union Mutual Life Insurance Co. on lots two and four, in block twenty-one, Canal 'Trustees' subdivision of the south fractional quarter of section three, town. thirty-nine north, range fourteen east, of the third principal meridian, since August 1st, 1882 ?

A. My belief is I have paid them all. I believe I have paid every one.

Q. Since 1882 ?

A. Yes, sir ; taxes and assessments.

431 Q. What rate of commission have you received from the company for such taxes and assessments as you have paid ?

Objected to by counsel for plaintiff as incompetent and immaterial.

A. I have received from them five per cent. on all property that I have purchased, and the company paid me two and a half per cent. on all payment of taxes that I made.

Cross-examination.

By Mr. DALY :

Q. All the purchases that you have made have been made on behalf of the Union Mutual Life Insurance Co. ?

A. Yes, sir.

Q. And at their request ?

A. Yes, sir.

Q. Mr. Hamilton, it is as easy to pay a bill for taxes or assessments amounting to \$100 as to pay one amounting to \$10, isn't it ?

A. It is the same work.

Q. The same amount of labor involved?

Objected to by counsel for defendant.

A. Yes, sir.

Q. The Union Mutual Life Insurance Co. could have paid these taxes itself, could it not?

A. No, sir.

Q. Will you please state why?

432 A. Because they had a contract with me, which has been introduced here in evidence, whereby I was to take care of all their property and taxes in which they were interested here at that price.

Q. That is the only reason they could not have done it themselves?

Objected to by counsel for defendant.

A. Yes, sir.

Redirect examination.

By Mr. WEAN:

Q. Mr. Hamilton, do you consider that a reasonable commission for the work done in this case?

Objected to by counsel for plaintiff as incompetent and immaterial.

A. I think it is small enough and it is the usual charge made by persons in the business.

Adjourned to 11 o'clock, August 18th, 1891.

STATE OF ILLINOIS, }
County of Cook, } 88:

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE CO. }

433 Office of I. K. Boyesen, master in chancery.

AUGUST 18, 1891—11 o'clock a m.

Met pursuant to adjournment.

Present: Same as before.

P. F. BIESEN, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. WEAN:

Q. You may state your name, residence, and occupation.

A. P. F. Biesen. I live at 2528 Dearborn; am a sidewalk contractor.

Q. Are you in business alone?

A. I am alone since the 19th day of December last.

Q. Prior to the time what was the name of your firm?

A. Biesen & Wheeler—that is, for two years and a half it was Biesen & Wheeler prior to that time.

Q. You may examine the paper I hand you, marked Exhibit "55," and state what it is.

A. This paper is for a sidewalk that we built on this lot for Mr. Hamilton for the Union Mutual Life. I worked at that myself. I helped build this walk myself. The walk was in a dangerous condition.

434 Mr. HERBERT: Please just answer the question put to you.

Mr. WEAN:

Q. State how you came to build this sidewalk.

A. Well, Mr. Hamilton was notified from the city to build a walk. He had, I think, ten days' time, and we done all his work at the time and do now, and he sent word for us to call down and see him. I forget now whether it was my partner or myself. I am not certain. We went down and went over and looked at it and told him how the walk was—I believe it was my partner—so he told us to go on and build it, and I went over there myself.

Q. Did you examine the condition of the old walk?

A. Yes, sir.

Q. You may state the condition of it.

A. The condition was—the planks were rotten; had holes in that a lady would get her foot in; dangerous; and the sleepers were all rotten, and nails would not hold if you tried to make them hold.

Q. Did you build the walk as stated in the bill?

A. Yes, sir.

Q. Did you receive the amount for building the walk as stated in the bill?

A. Well, now, I suppose that figure is right. I received 26 cents a foot for 146 feet. Yes; that is right.

Q. Are you acquainted with the prices for such sidewalk work?

A. Yes, sir.

Q. Is this a reasonable charge for the work?

435 —. I get from 26 to 27 cents a foot.

Q. Is this a reasonable charge?

A. This is reasonable, because I did a first-class job then.

By Mr. WEAN: In support of item No. 10, in defendant's statement, I offer a receipt signed by John N. Young, given in lieu of a former one of date March 14th, 1878, and ask to have the same marked Exhibit "58."

Mr. HERBERT: It is admitted that the expenditure therein described was made for the purposes therein stated, but the admission is made reserving the right to object to the fact admitted, for the reason that such expenditure was made prior to the date of the set-

tlement or agreement between Kirchoff and the company for redemption. The foregoing admission is made for the purpose of saving the necessity of further testimony to prove the fact, but such testimony and fact are objected to as above.

Complainant also admits the following two expenditures for continuations of abstract, to wit, \$7.50, paid July 20, 1882, for examination by Haddock, Vallette & Rickords, No. 45540, and \$14.50 for examination No. 142,996. Handy & Co. paid July 9, 1891, as per bills.

Mr. WEAN: I offer, as Exhibit "59," a duplicate bill of Haddock, Vallette & Rickords for \$7.50, dated June 2, 1882; also, as Exhibit "60," receipted bill of Handy & Co. for \$14.50, dated June 18, 1891, being the same items referred to by Mr. Harbert.

436 By Mr. MEAN:

Q. Mr. Harbert, do you admit that the expenditure of \$100.00 paid to E. F. Runyan for a quitclaim deed of the premises in controversy, on October 16, 1882, to the Union Mutual Life Insurance Co. was a proper charge in this accounting?

A. The expenditure referred to, being item No. 26 in defendant's statement, I regard as a proper charge in this accounting and admit that the expenditure was made as claimed.

STATE OF ILLINOIS, {
County of Cook. }

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF
vs.
THE UNION MUTUAL LIFE INSURANCE CO. }

FRIDAY, October 23, 1891—11 o'clock a. m.

Present: Harbert & Daley for complainant and Grosscup & Wean for the defendant.

Notice is given by complainant to the defendant and its attorneys that defendant is requested to introduce any additional proof, if any it may have, as to outlays on account of any other matter of expenditure by it had as mortgagee in possession, and particularly any

437 expenditure on account of any purchase by it of a claim or cloud upon the title or some part thereof, described in a certain deed from Walter Evans, Commissioner of Internal Revenue, to the defendant company, dated September 10, 1884, and recorded in Cook county, Illinois, records, on September 22, 1884, in Book 1524, at page 388.

Notice is further given that for the purpose of introducing any such proof of outlay, if any such there may have been, complainant waives objection to the introduction of such proof at this time, but asks that such proof shall be made before complainant enters upon the counter-proof in this case.

Complainant also gives notice that she will demand of and from
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the defendant and ask the court to order and decree that, upon the payment by the complainant to the defendant of such an amount as the court shall find due, the defendant shall convey and assure to the complainant not only all title and interest now held by said defendant in and to said property or any part thereof, but all clouds upon or claims to said property or any part thereof held by others in the interest or upon the procurement of said defendant.

Counsel for defendant states that they do not desire to introduce further proof at this time, and thereupon the complainant enters upon her proof.

Complainant offers in evidence copy of an abstract of deed from Walter Evans, Commissioner of Internal Revenue, to the Union Mutual Life Insurance Co., a corporation organized under the laws of Maine, as "Complainant's Ex. 1."

438 It is stipulated that said exhibit may be introduced subject to the same objection which might be urged against the original if offered—that is, no objection is made to the introduction of this in lieu of the original.

Complainant also offers in evidence abstract of deed from Joel D. Harvey, collector, etc., to the United States of America, dated August 29, 1882, and recorded September 26, 1882, in Book 1261 of Cook County, Illinois, Records, page 294. Same as marked "Compl't's Ex. 2," and by stipulation the same is allowed to go in subject to the same objection as Exhibit No. 1.

It is stipulated as to item No. 14 of defendant's statement of account that judgment for the taxes upon which said deed was issued was annulled by the Supreme Court in the case of *Burbank et al. vs. The People*, 90 Ills., 554, and that the same was vacated, annulled, and set aside by a decree of the county court entered March 19, 1880, but defendant does not by this stipulation waive its claim to be reimbursed for the amount expended therefor.

ROBERT B. KENDALL, called on behalf of the complainant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. HARBERT:

Q. What is your name, age, residence, and business?

A. I am of lawful age, attorney-at-law by occupation, and reside in Evanston.

439 Q. Were you ever attorney for The Union Mutual Life Insurance Co., the defendant herein; and, if so, from what time to what time approximately?

A. I was attorney for that corporation from 1875, I think, till some time in 1881.

Q. Had the company during that period any business with or for Elizabeth Kirchoff, the complainant herein?

A. Yes, sir.

Q. Do you remember in connection with that business anything

in relation to a claim of the United States Government against some of the Kirchoff property on which the company held a lien?

A. I recollect some matters in connection with the claim of the Government.

Objected to by counsel for defendant because the question does not specify what property.

Q. If you had anything to do on behalf of the company with reference to said claim, please state, as succinctly as you can, what you had to do with it in respect thereto, and how the matter arose.

A. I suppose my connection with the company generally is already in evidence in this case in the testimony taken. Some time, while I was acting for the insurance company as its attorney, and having charge of this case of the company against Kirchoff, based on the loan made to Kirchoff, Mr. Kirchoff called at my office one

440 day and told me that some official of the United States Government had been to see him with reference to a claim that the Government held on a portion of the property involved

in this present suit with reference to a settlement or adjustment of the claim by Mr. Kirchoff, and he requested me, as representing the company, to call on this gentleman, who was stopping at the Palmer house, and he advised me that he had arranged with the gentleman for an interview with me on a certain evening, and on the evening named Mr. Kirchoff and I called on this Government official at his room at the Palmer house, and he explained to me the nature of the claim that the United States held against this property, and showed me the papers in connection therewith, and he showed me a deed to a portion of the lots involved in this controversy, made, as I recollect, to the United States or to some officer of the Government, I don't recollect which, but I recollect distinctly there was a deed shown. As I recollect, the claim was based on a seizure made by the revenue officers of the Government some years before of property that was used as a distillery, or something of that nature, occupying a portion of the lots involved in this suit, a sale having been made by the revenue officers pursuant to the seizure and the confiscation of the property.

Q. About when was this?

A. I haven't a very definite recollection as to the time. As near as I can fix upon the time, it was between 1878 and 1880, but I don't recollect, and have no memorandum to refresh my recollection, either.

Q. Do you remember whether that claim covered the entire
441 property or only a portion of it?

A. I recollect that it covered only a portion. I think I have stated it was a portion of the property.

Q. Do you remember whether it did or did not cover the property?

A. I think it covered small portions of the adjoining lots, as well as the two lots involved in this suit.

Q. What, if anything, was said in that interview in regard to the amount of the demand, etc.?

A. I don't recollect that any price was named at which the claim could be settled. I think it was the intimation at least that an offer would be entertained for any reasonable amount.

Q. You say Mr. Kirchoff called your attention to this matter?

A. Yes, sir; that was the first information, I think, that I had on the subject.

Q. Did Mr. Kirchoff express any desires with reference to the company doing anything about it?

A. Why, I so regarded it—the fact of his asking me to interest myself in the matter and visit the gentleman at the Palmer house and see what it all amounted to, whether anything could be done.

Q. What did the company do with regard to the matter at that time or thereafter, to your knowledge?

A. I don't recollect anything being done, except that I investigated the claim to some extent, and, as I recollect, I reported to the company the facts that I had learned, and subsequently, I
442 think it was in the fall of 1880, possibly in December, 1880, that at the suggestion of the president of the company, perhaps at my suggestion also, I went to Washington to investigate the matter further there with reference to making terms for settlement with the Government, and I called at the Treasury Department, saw the Commissioner of Internal Revenue—John Raum, I think, was at the head of the office at that time—and had a talk with him in regard to this claim. I also saw one or two other subordinate officials in the office, and again looked over the papers in connection with the seizure and sale of this property, and had some talk with them in regard to the price at which the claim could be taken up. I did nothing further in the matter, as I recollect, because very soon after that I ceased to be the attorney for this company and had no further interest in the matter.

Q. You spoke of being at Washington and having negotiations in regard to purchase. Please state whether any price was named or intimation given as to what the Government would be satisfied with.

A. I think the first man I interviewed in the office at Washington was the person who had charge of this kind of business, charge of the papers, but he was a subordinate official—clerk or something of that sort—and he named a price which I thought was unnecessarily high, and I think it was the consideration that was stated at the sale in the papers I had examined. I thereupon went to the Commissioner of Internal Revenue himself, and, although I think he did not name any price, he told me that the Government would
443 entertain any reasonable proposition for settlement, he thought, and I think that is about all.

Q. Was there any price named by you?

A. No; I don't remember that I made any offer. I am pretty sure I did not at that time. On my way home from that trip East, however, I met on a train Mr. Harvey, who was the internal revenue collector here at Chicago, and I introduced the subject to him, and he told me that he thought if I should submit in writing an offer of \$200 or \$250, I forget which, one or the other, he would be

directed to offer this property for sale, and there would probably be no bidders of any large amount, and I could settle matters with him on the payment of some such sum of money as that and the expenses of the sale. That is all I recollect of the matter.

Q. Do you remember reporting these matters to the other officers of the company?

A. Well, I recollect only in a general way that I communicated with them in regard to the claim. After my visit to Washington I went to Boston, the headquarters of the company at the time. I don't recollect, however, whether we discussed this matter or not.

Mr. KIRCHOFF, called on behalf of the complainant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. HARBERT:

Q. You are the husband of Elizabeth Kirchoff, the complainant in this suit?

444 A. I am; yes, sir.

Q. You have heard the testimony of Mr. Kendall?

A. I have.

Q. Do you remember going to see Mr. Kendall in regard to this Government claim?

A. I did.

Q. Please state briefly how you came to go there.

A. It was before 1880 a party came and asked for me. He was in my business first, I think, and they sent him up to my house, and I asked what he wished, and he says he was an official from Washington "to see in the matter of your seizure there," and I said, "What do you wish?" and he said, "Well, I want to see about it." I asked him, "Where can I see you tomorrow?" He said, "You can see me tomorrow night at the Palmer house." I said during that time I would see one of the gentlemen at the office of the Union Mutual Life Insurance Co., and where could I meet him with the party, and he said, "In the evening, at the Palmer house." I went to Mr. Kendall the next day and said, "There is somebody in from Washington on account of that little seizure in regard to the four lots there." We went over to the Palmer house that night, but he told me before I went there.

Q. Who went over?

A. Mr. Kendall and I. Before Mr. Kendall and I went to the Palmer house the gentleman says, "Now you perhaps know for what it is?" I said, "Yes; it is for the seizure." I could
445 get the property for any offer I would make. He stated pretty near what it was. I think he said an offer of \$250 would get it.

Q. That is what this agent told you?

A. Yes, sir.

Q. Did you go to see Mr. Kendall and get him to make the offer for the company?

A. No; I didn't do that. I didn't tell him to make an offer. I went to Mr. Kendall and told him a gentleman from Washington was there who wished to meet him at the Palmer house on account of that business, and Mr. Kendall and I went over to the Palmer house.

Q. You called to see Mr. Kendall as an officer of the company?

A. Of the company, certainly; and Mr. Kendall went then with me to the Palmer house.

446 Cross-examination.

By Mr. WEAN:

Q. Mr. Kirchoff, did you ever make for yourself or for Mrs. Kirchoff, as her agent, an offer to the Government for this claim?

A. The party told me himself if I make that offer for the seizure I can have it.

Q. Did you ever make an offer?

A. I went to the party for the benefit, as I understood it was better to have one of the party of the Union Mutual Life Insurance Co. and make the contract, because we had the money on the whole.

Q. You can answer the question yes or no. Did you ever make that offer?

A. No; I never made that offer myself.

Q. Nor for Mrs. Kirchoff?

A. No, sir; he said I could get it for that if I would make that offer.

Counsel for defendant reserves the right to cross-examine Mr. Kendall.

STATE OF ILLINOIS, }
County of Cook. }

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF
vs.
UNION MUTUAL LIFE INSURANCE CO. }

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THURSDAY, November 5, 1891—10 o'clock a. m.

The defendant now moves to strike out all the testimony submitted on this accounting of Robert E. Kendall and Julius Kirchoff as irrelevant to the accounting.

The defendant now asks leave to change the statement of account in respect to its receipts on account of rents by withdrawing therefrom from April, 1884, to the present time all the amounts above \$40.00 per month charged against it on account of such rent, and to amend said account by charging itself with \$40.00 per month on account of rents.

Which motions are objected to by counsel for the complainant and reserved to be considered with the report.

Counsel for the defendant have offered items 2 to 15, inclusive, of their statement of credits against the complainant upon their understanding that if these claims were allowed the company would release and quitclaim to the complainant all its interest in the premises acquired by the purchase of the tax titles therein represented and the taxes therein shown to have been paid. This offer is made to enable the complainant to acquire such title by redemption, if she desires, but the defendant expressly asserts that if such offer is not accepted or if the master finds that the items of such taxes are not properly within the scope of this accounting it does not waive its right to set up as independent and outstanding title and lien against this property the tax title therein represented.

448 Counsel for complainant objects to the injection of conditions at this time with respect to testimony heretofore offered unconditionally and does not understand counsel as intimating that such testimony was offered subject to any conditions at the time it was offered.

DEFENDANT'S EXHIBIT 1, HOLWAY.

Memorandum of agreement, made this twenty-second day of September, A. D. 1876, by and between the Union Mutual Life Insurance Company and D. G. Hamilton of Chicago, witnesseth, that

1. The said Hamilton agrees to purchase all tax titles offered for sale from and after this date, during the current year, to land in which said company is interested as mortgagee, or *cestui que trust* under trust, deeds, lying within the county of Cook in the State of Illinois.

2. The said Hamilton is to prepare suitable books of account for said purchases, in the manner and form now used by him in such matters.

3. The said Hamilton is to render to said company or its financial agent in Chicago, from time to time, a statement of the purchases made by him, which shall be verified by said agent; and if found correct the said company shall advance the necessary funds to pay for the same; and the certificates of purchase, after being endorsed in blank by said Hamilton, shall thereupon be delivered to said company or its agent.

4. The said Hamilton agrees to compound and compromise with the owners of said lands, so far as is possible, using his best
449 endeavors so to do; to do all clerical and office work connected with the adjusting and compounding of the same, serve all notices required by law, prepare and take out tax deeds as occasion may require, pay all taxes necessary for the protection of said certificates in order to entitle the purchaser to a tax deed, (the said company furnishing the money therefor) and do all things necessary for the proper handling and adjusting of the same, and generally to act for said company in the premises to the best of his judgment and skill, the same as if the business was his own.

5. Upon the compounding or redemption of each of said certificates or deeds the said Hamilton shall retain, as his compensation

for the foregoing services, after deducting interest at the rate of ten per centum per annum on the amount advanced by said company, as aforesaid, (and upon any advances or, payments hereinafter mentioned to be made by said company in the nature of fees &c.) one-half of the penalties collected by him in such settlement, and any expense incurred by him for necessary advertising; and shall pay over to said company the balance of the amount collected by him as aforesaid, together with said interest of ten per cent.

6. The said company shall pay all fees for the county clerk, which are authorized by statute, for issuing tax deeds upon said certificates, and also all recording fees for the same.

In witness whereof said company hath executed this agreement, by John E. De Witt, its president, and the said Hamilton hath hereunto set his hand the day and year first written.

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UNION MUTUAL LIFE INS. CO.,
By JOHN DE WITT, *President*.
DAVID G. HAMILTON.

DEFENDANT'S EXHIBIT 2, HOLWAY.

Memorandum of agreement, made and entered into this thirtieth day of June, A. D. 1877, by and between the Union Mutual Life Insurance Company and D. G. Hamilton, witnesseth; that whereas, the said company is interested in certain real estate in Cook county, Illinois, as the *cestui que trust* under certain trust deeds held by said company as security for loans, and whereas said company is desirous of protecting the titles to said real estate, from tax liens, sales and incumbrances growing out of taxes assessed thereon:

Now therefore, it is agreed by the parties hereto that the said Hamilton shall attend all tax sales during one year from and after the day of the date hereof, where any of the said property shall be offered for sale for or on account of taxes or assessments, and at such sales shall purchase for said company all property in which said company shall be interested as aforesaid, or shall pay the said tax or assessment in cases where payment shall be necessary in order to protect the interest of said company the said company furnishing the necessary funds upon demand for said payments and purchases.

In consideration of said services so to be rendered by the said Hamilton the said company shall pay him as compensation
451 in full, such sum of money as shall be equal to five per cent. of the amounts expended by him in making said purchases and two and one-half per cent. of the amounts expended by him in making said payments upon presentation and delivery to said company or its duly authorized agent, of the tax-sale certificates and tax receipts.

The said Hamilton also agrees to do all things necessary in the premises for the interests of said company, to the best of his judgment and skill, the same as if the said interests were his own.

The agreement made and entered into by and between the parties hereto on the twenty-second day of September, A. D. 1876, relative to the purchase of tax titles etc., is hereby terminated, and the parties

thereto mutually released from any further obligation or duties imposed by the terms thereof, from and after the date hereof.

In witness whereof the said Union Mutual Life Insurance Company hath hereunto caused its corporate seal to be affixed and these presents to be subscribed by John E. De Witt, its president, and the said Hamilton hath hereunto set his hand and seal the day and year first hereinbefore written.

UNION MUTUAL LIFE INSURANCE COMPANY,
By JOHN E. DE WITT, *President*.

Witness — John E. De Witt' signature:
FREEMAN NICKERSON.

[L. S.]

452 Witness to D. G. H.:
ROBERT B. KENDALL.

D. G. HAMILTON. [SEAL.]

The agreement above written is hereby renewed and continued, by mutual consent, and the same is to be considered in force until terminated by thirty days' notice, to be given by either party, in writing.

Dated at Chicago the 3d day of July, A. D. 1878.

UNION MUTUAL LIFE INSURANCE
COMPANY,
By JOHN E. DE WILL, *President*.
D. G. HAMILTON.

And thereupon, on the 19th day of January, A. D. 1892, there was filed in said court certain exceptions to master's report; which are in the words and figures following, to wit:

STATE OF ILLINOIS, }
County of Cook, } ss:

Exceptions to Master's Report.

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF	}	Gen. No., 41522. Term No., 3097.
vs.		
THE UNION MUTUAL LIFE INSURANCE Co.		

And now comes the Union Mutual Life Insurance Company, by its solicitors, Grosseup & Wean, and excepts to the report,
453 and also the supplemental reports, of the master filed herein on the ninth day of January, 1892, in the particulars and for the reasons hereinafter named.

Exception I.

The appellate and supreme courts found that allegations of the bill and the proofs submitted in support thereof showed that about July,

1878, an agreement was entered into between the complainant and the defendant whereby the complainant was entitled to redeem from the trust deed held by the defendant the two certain lots in dispute upon the execution by said complainant of her mortgage for the sum of ten thousand dollars (\$10,000), bearing interest at the rate of six per cent. (6 %) per annum, and payable one thousand dollars (\$1,000) per year for ten (10) years. Upon the basis of this agreement the decree of the circuit court was by the appellate court reversed and remanded, with directions to have an account taken of the amount due the company on said agreement, crediting them with the principal sum of ten thousand dollars (\$10,000), and, among other things, with all proper disbursements on account of taxes, outlays, etc., after the tenth day of December, 1879, and charging them with rents, etc. This order of the appellate court was affirmed by the supreme court, but no decree has as yet been entered in this court directing the accounting or determining its scope. The evidence submitted to the master in support of items numbers two to fifteen (2-15), inclusive, of defendant's statement of account shows the expenditure of the amounts therein named prior to the tenth day of September, 1879, in the acquiring and taking up of 453½ tax titles on said property as therein set forth and the payment of taxes and purchases at tax sales as therein set forth. Items eleven to fifteen (11-15), inclusive, of said accounts are for the amounts paid out in the purchase of said lots at tax sales and the buying in of outstanding tax deeds between the said date of July, 1878, and September tenth (10), 1879.

Items two to ten (2-10), inclusive, of said account are for the purchase of said lots at tax sales and the purchase of tax titles thereof prior to said July, 1878. None of these expenditures came within the issues of the case as made by the bill and answer, or were incorporated in the record of the case, and none of them, therefore, had come to the knowledge or presence of the appellate or supreme court when the direction aforesaid was made.

The master in his report and supplemental report aforesaid has omitted said items from the accounting, and finds that the said complainant is entitled to redeem said lots upon the payment of a sum of money that does not include said items.

This defendant excepts to said report because said items and each of them ought to have been included in the amount payable by the complainant to redeem said premises. The defendant also excepts because the master finds the complainant entitled to redeem generally without repaying to the defendant its outlays on account of said items or any of them.

Exception II.

The defendant excepts to the said report and each and all of its findings because the scope of said report was not fixed by previous decree of this court, and is not in pursuance of any decree
454 of this court.

Exception III.

The defendant excepts to the report of said master because it is not in accordance with the directions of the appellate or supreme court in the particular of items two to fifteen (2-15), inclusive, but is contrary thereto.

Exception IV.

The defendant excepts to the said report because in effect it requires the defendant to quitclaim from its paramount title acquired through the tax deeds and sales mentioned in items two to fifteen (2-15), inclusive, without being reimbursed therefor.

Exception V.

The defendant excepts to the said report because in effect it requires the defendant to quitclaim from the paramount title acquired by it as set forth in items two to fifteen (2-15), inclusive, and the proof in support thereof, when the redemption decreed is from the trust deed only and not from such outstanding title.

THE UNION MUTUAL LIFE INSURANCE CO.,
By GROSSCUP & WEAN, *Its Solicitors*.

And thereupon, on the 27th day of January, A. D. 1892, there *was* filed in said court certain exceptions to master's report, which are in the words and figures following, to wit:

455 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of said County.

ELIZABETH KIRCHOFF	} Exceptions to Master's Report.
vs.	
UNION MUTUAL LIFE INSURANCE CO.	

Comes now Elizabeth Kirchhoff, complainant herein, and excepts to the master's report and supplementary reports filed in this cause on the 9th day of January, 1892, for the following grounds, to wit:

Exception first. The master has failed to allow complainant interest on the rents collected by defendant from the property in question since the date of the agreement as determined by the appellate and supreme courts, whereas such interest should have been computed and allowed complainant.

Exception second. Complainant excepts to the allowance by the master to defendant of compensation for collecting rents and paying taxes on the premises in question while it was wrongfully in possession of said premises by reason of its breach of its agreement with complainant as to a purchase thereof.

Exception third. Complainant excepts to all items for water rates allowed by said master to defendant on the ground that taxes for

water are incident to the use of property and should have been paid by the tenant, there being no evidence of any agreement between the tenant and the landlord as part of the contract of letting that the landlord should pay such taxes.

Exception fourth. Complainant excepts to allowance by the master in the accounting of each and every of the items of the defendant's bill of particulars filed before the master so far as the same relates to the construction or repair of sidewalks for the reason that such expenditures are not shown to have been necessary or reasonable or for work or material actually furnished and used upon said premises.

HARBERT & DALEY,
Solicitors for Complainant.

And afterwards, to wit, on the 25th day of April, A. D. 1892, a certain motion was filed in said court and a certain order was made and entered of record; which said motion and order are in the words and figures following, to wit:

ELIZABETH KIRCHOFF	}	4522, 3097. Bill and Amended Bill.
vs.		
UNION MUTUAL LIFE INSURANCE COM-		
PANY.		

This day comes the defendant and files *his* motion to have the report re-referred to the master in chancery; which said motion was argued by counsel for the respective parties, and the court, being fully advised in the premises, doth deny said motion.

STATE OF ILLINOIS, }
County of Cook, } ss:

In the Circuit Court of Cook County, in Chancery Sitting.

ELIZABETH KIRCHOFF	}	Gen'l No., 41522. Term No., 3097.
vs.		
UNION MUTUAL LIFE INSURANCE COMPANY.		

To Harbert & Daley, solicitors for complainant:

Please take notice that on Monday, the 25th day of April, A. D. 1892, or, at any time to which said cause may be adjourned, and in connection with the hearing upon the said cause on the master's report filed therein we will present a motion to the court, copy of which is hereto attached, and shall ask the court to make an order thereon.

GROSSCUP & WEAN,
Solicitors for Defendant.

Received a copy of the above this twenty-first (21st) day of April, A. D. 1892.

HARBERT & DALEY,
Solicitors for Complainant.

458 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County, in Chancery Sitting.

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

} Gen'l No., 41522.
Term No., 3097.

And now comes the Union Mutual Life Insurance Company aforesaid, by its solicitors, Grosscup & Wean, and moves the court for a re-reference of the above-entitled cause to the master in chancery of said court to take evidence upon and to report his conclusions of law and fact upon the following questions, to wit:

1. What proportion of the rents collected by the Union Mutual Life Insurance Company upon the premises described in the bill since the tenth day of September, A. D. 1884, properly belongs to and arose from that portion of said premises described in a deed executed and delivered by the Commissioner of Internal Revenue of the United States to said Union Mutual Life Insurance Company on the tenth day of September, A. D. 1884.

2. What proportion of the taxes paid by the said Union Mutual Life Insurance Company since the said tenth day of September, A. D. 1884, ought to be charged against that portion of the premises described in the said deed from the Commissioner of Internal Revenue of the United States to said Union Mutual Life Insurance

459 Company.

The said Union Mutual Life Insurance Company further moves that the statement of account made by said master in this cause may be so amended in accordance with the findings of the master respecting the said matter of rents and taxes as the justice of this cause requires.

This motion is based upon the following reasons and considerations, to wit:

Motion.

On the eleventh day of March, A. D. 1871, a portion of the premises described in said bill, to wit, beginning on the north line of block twenty-one (21), in the Canal Trustees' subdivision of the south part of fractional section three (3), township thirty-nine (39) north, range fourteen (14) east, of the third principal meridian, at a point one hundred and fourteen (114) feet east of the corner of Rusk St. and Pearson St., in Chicago, Illinois, thence running south eighty-three (83) feet; thence east sixty-four feet (64) and nine (9) inches; thence north thirty (30) feet; thence west twenty-eight (28) feet; thence north fifty-three (53) feet; thence west thirty-six (36) feet and nine (9) inches, to the place of beginning, with buildings thereon, being premises known as the distillery of J. Kerchoff & Co., No. 80 Pearson St., Chicago, Illinois, was seized by the collector of internal revenue for the first collection district of Illinois for the non-payment of assessments and taxes due to the United States; that on the 29th day of August, A. D. 1882, in pursuance of due

notice and the proceedings required by law, the said portion of said premises having been duly sold to and bid off by the United States, a deed was issued and delivered to the United States by the collector of internal revenue for said district, vesting the United States thereby with title to said portion of said premises; that on the tenth day of September, A. D. 1884, the United States, being then in possession of said portion of said premises under said seizure and said deed, conveyed the same by deed duly executed and delivered to the Union Mutual Life Insurance Company, under which said company became possessed and vested with title to said premises; that the said company still remains in possession thereof and the owner of the said title. The reference to the master heretofore made and under which the report has been filed was without reference to the above state of facts, and required an accounting respecting the rents and profits and the taxes on the land described in said bill, irrespective of any rights or obligations growing out of the above outstanding paramount title. A portion of the rents with which the said Union Mutual Life Insurance Company in said report is charged is for the rent of buildings standing on the portion of the premises so conveyed to it by the United States, and such rents are in amount in excess of such portion of the taxes and repairs credited to said company as ought equitably to be charged against said portion of said premises, if any should be so charged, so that said defendant is in fact and in effect receiving no reimbursement in the report as it now stands for the taxes paid out upon said portion of said premises; but an exact statement of said rents and said taxes can only be ascertained by a further hearing with reference thereto.

UNION MUTUAL LIFE INSURANCE
COMPANY,

By GROSSCUP & WEAN, *Its Solicitors*.

And afterwards, to wit, on the 13th day of July, A. D. 1892, the following proceedings were had and entered of record in said court, to wit:

ELIZABETH KIRCHOFF	}	41522,3097. Bill and Amended Bill.
vs.		
UNION MUTUAL LIFE INSURANCE COMPANY.		

And now comes the defendant, by its solicitor, and enters *his* motion for leave to file an amendment to answer, which was argued by counsel; and the court, being fully advised in the premises, doth deny said motion.

And afterwards, to wit, on the 26th day of January, A. D. 1893, there was filed in said court a certain appellate court opinion, which is in the words and figures following, to wit:

At a term of the appellate court begun and held at Chicago on Tuesday, the first day of October, in the year of our Lord one thousand eight hundred and eighty-nine, within and for the first district of the State of Illinois.

Present: Hon. Jos. E. Gary, presiding justice; Thos. A. Moran, justice; Gwynn Garnett, justice; J. J. Healy, clerk; C. R. Matson, sheriff.

ELIZABETH KIRCHOFF	}	3359. Filed Oct. 28,
<i>vs.</i>		'89. Error Cook
UNION MUTUAL LIFE INSURANCE COMPANY.		Circuit.

The facts in this case, as established by a preponderance of evidence, are that in May, 1871, the insurance company loaned \$60,000 to the complainant and plaintiff in error and her husband, Julius Kirchoff, and her mother, Angela Diversy, upon their note secured by a trust deed conveying many parcels of land belonging to them in severalty, among which were lots 2 and 4, in block 21, of the Canal Trustees' subdivision of the south fractional quarter, sec. 3, T. 39 N., R. 14 E., 3d P. M., which were the property of the complainant.

In 1878 there was default in payment. Reasons not very clearly shown by the record led to negotiations which resulted in the conveyance by the mother of all her lands included in the deed except forty acres which the company released to her and by the complainant and her husband of all their lands included in the deed, which conveyances the company accepted in satisfaction of their debt; but as part of the transaction it was agreed that the complainant might purchase from the company those lots for \$10,000, the term for the payment of which are involved in considerable uncertainty, except that they were to extend over a period, probably, of nine years, but which certainly has now elapsed, and the rate of interest was to be six per cent.

She filed her bill to have the benefit of this agreement. The bill was dismissed upon the hearing. As was said in *Sargent v. Howe*, 22 Ills., 148, the deed of trust in this case "only differs from a mortgage with power of sale in its being executed to a third person instead of the creditor;" and therefore the dealings between the parties are within the rule applicable to mortgagors and mortgagees, "that the courts look upon their transactions with jealousy." 1 Jones Mtg., 711.

The evidence as to the agreement is by the testimony of Julius Kirchoff, E. A. Warfield, then general agent, and R. B. Kendall, then attorney of the company, and it was made between Julius Kirchoff, acting for the complainant, and Warfield, with some participation by Kendall, acting for the company.

The authority of Warfield to act for the company under circumstances as shown by this record has been affirmed by the Supreme Court in the cases of this Company *v. White*, 106 Ill., 69, and 464 *v. Slee*, 110 Ill., 35. The testimony of Julius Kirchoff is much weakened by the inconsistency of his conduct afterwards with the agreement, but it is so corroborated by Warfield and Kendall that there is sufficient proof of the agreement.

Before the conveyance to the company, the company had commenced foreclosure proceedings, in which they sought to reform the

description of part of the lands of Mrs. Diversy. She had answered, contesting it, and alleging a defense, which, if successful, would have invalidated most, if not all, of the papers she had executed. The company understood, whether correctly or not is immaterial, that they could make no adjustment with or without the assent of the Kirchoffs. There were, therefore, considerations to induce the company to make the agreement, and that they did make it is satisfactorily proved, and they have had from it all the benefit they proposed to obtain by it. The foreclosure proceedings went on after the conveyance, to cut off the intervening title, but with the agreement that it should not affect the agreement as to the lots described.

The company obtained deeds under the foreclosure in January, 1882, but refused to perform the agreement made by Warfield. As to the effect of this agreement, the rule in equity, "once a mortgage always a mortgage," applies.

As was said in *Euner vs. Thompson*, 46 Ill., 215, "When the mortgagor has conveyed the mortgaged premises to the mortgagee, it only operates as a bar to the equity of redemption, when it clearly and unequivocally appears that both parties so understood and intended it should."

465 Here the contrary as to the two lots clearly and unequivocally appear; and it does not affect the complainant's right to redeem those lots that as to the residue of the mortgaged property there is no redemption, and that she proposes to pay but a small part of the original debt. When by the operation of law upon the acts or by the agreement of the parties the debt has been apportioned and a part of it made the sole burden upon a part of the incumbent property, that part may be redeemed by paying that part of the debt apportioned to the part redeemed. *Meecham vs. Steele*, 93 Ill., 135; *Mutual Mills Ins. Co. vs. Gordon*, 121 Ill., 366.

The complainant filed her bill to redeem in June, 1882. The lots she was to redeem and the principal sum she was to pay, as well as the rate of interest, are definitely fixed by the agreement.

The term at which the interest was to begin and the amounts and times of payment of the installments are left uncertain; but this is not a bill for specific performance, it is an appeal to a court of equity by the complainant that she may have her property restored to her upon the terms that she shall discharge the burden upon it, fixed in amount by agreement, and which, if that agreement had been executed and performed, would have been discharged in the times that has elapsed.

She is now entitled to the benefit of that agreement upon the terms that she, within a short time after the amount is ascertained, pay it.

466 The decree is therefore reversed and the cause remanded to the circuit court with directions to that court to have an account taken of the amount due the company, crediting them with the principal sum of \$10,000 and interest thereon at six per cent. from September 10th, 1879, the day of the delivery of the deed of the complainant and her husband to the company, together with what-

ever the company has paid for taxes, assessments, insurance, repairs and other expenses upon the property, so far as the same may be found to have been reasonably necessary, and charging them with the rents and profits which they have or by ordinary care and diligence ought to have received from the property, interest to be allowed upon the disbursements if not repaid by the rents and profits (but there is to be no compounding of interest), and, when the amount due the company is ascertained, to enter a decree that upon the payment of that amount, with interest thereon, within ninety days thereafter, the company convey to her, and that in that event she recover her costs.

But if she do not so pay, the bill will be dismissed at her costs. *Bremer vs. Canal and Dock Co.*, 127 Ill., 464.

. Reversed and remanded.

Garnett, J., does not concur in the conclusion reached.

I, John J. Healy, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final opinion of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 31st day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

JOHN J. HEALY,

[SEAL.]

Clerk of the Appellate Court of the First District.

And on the same day, to wit, on the 26th day of January, 1893, there was filed in said court a certain opinion of supreme court, which is in the words and figures following, to wit:

State of Illinois Supreme Court, Northern Grand Division.

At a supreme court begun and held at Ottawa, on Tuesday, the fourth day of March, in the year of our Lord one thousand eight hundred and ninety, within and for the northern grand division of the State of Illinois.

Present: Simeon P. Shope, chief justice; John Scholfield, justice; Benjamin D. Magruder, justice; David J. Baker, justice; Alfred M. Craig, justice; Joseph M. Bailey, justice; Jacob W. Wilkin, justice; George Hunt, attorney general; Lawrence Morrissey, sheriff; Alfred H. Taylor, clerk.

Be it remembered that afterwards, to wit, on the 12th day of June, A. D. 1890, the opinion of the court was filed in the clerk's office of said court in words and figures following, to wit:

UNION MUTUAL LIFE INSURANCE }
 COMPANY }
vs. }
 ELIZABETH KIRCHOFF.

No. 65. Error to Appeal from
 First District.

Opinion by Craig, J.

This was a bill in equity brought by Elizabeth Kirchhoff on the 12th day of June, 1882, against the Union Mutual Life Insurance Company to redeem lots 2 and 4, block 21, in Canal Trustees' subdivision of a certain quarter section of land in Cook county, to which the company acquired title under a quitclaim deed from complainant and her husband and under certain foreclosure proceedings in which she, her husband, and others were defendants. The record is quite voluminous, but the facts, briefly stated, are substantially as follows: On the 8th day of May, 1871, Julius Kirchhoff, complainant's husband, borrowed of the insurance company \$60,000, and to secure the payment he and Elizabeth Kirchhoff and her mother, Angela Diversey, executed their joint note; Kirchhoff and wife executed a *decree* of trust on all real estate they owned, including the two lots, their homestead. Mrs. Diversey also executed a deed of trust on lands owned by her to secure the loan.

In 1877, default having been made in the payment of the money, negotiations were commenced with a view of a renewal of the loan on long time at a reduced rate of interest.

These negotiations did not prove successful, and an effort was then made for a settlement by having the mortgagors surrender all or most of the property in payment of the debt. In the meantime judgment was rendered against Mrs. Diversey on the note by confession, and in July, 1878, bills were instituted in the circuit court of the United States to foreclose the two trust deeds.

In the trust deed executed by Mrs. Diversey a part of the premises belonging to her were incorrectly described, and in the bill to foreclose the company sought to correct the error.

Mrs. Diversey put in an answer denying any mistake in the description, and set up other matters of defense. On Jan. 1st, 1879, Kendall, the attorney of the insurance company in Chicago, wrote the company that in his opinion an offer to Mrs. Diversey to let her retain forty acres of the land would induce her to give the company a deed of the balance of the property; that Kirchhoff would surrender all his property and make an arrangement to buy back his homestead at a liberal price, but "I do not dare to settle with him without settling the whole case," as Mrs. Diversey's matters may be complicated by any settlement with Kirchhoff. To this the company replied: If settlement can be made of all complications in and with quitclaims from all parties, we will consent to let her keep 40 acres. A short time after this, about the 9th day of June, 1879, a settlement was made, and in September, 1879, Mrs. Diversey conveyed to the company all the land named in the trust deed which she owned, except the 40 acres, and that was released to her. At the same time complainant and her husband by quitclaim deed

conveyed to the company all the land named in the trust deed they had executed to the company. Thus far there seems to be no substantial dispute between the parties, but in reference to what arrangement was made between the complainants and the insurance company under which she quitclaimed all the property described in the deed of trust to the company and allowed a subsequent decree of foreclosure to be entered the parties do not agree.

The complainant insists that during the proceeding negotiations it was agreed, in consideration of her quitclaim deed, the appellant would reconvey to her two lots heretofore described, one of which was then occupied as her homestead, the other cornering upon it; that the price at which the reconveyance should take place was their valuation at a previous appraisement by James H. Rees, namely, seventy-five hundred and twenty-five hundred dollars respectively, and that complainant was to execute in payment therefor her notes for ten thousand dollars, extending over a period of ten years, bearing interest at six per cent. and secured by a mortgage upon the two lots.

The insurance company, on the contrary, contends that no such agreement was ever concluded, and that if it was complainant is not, under all the facts, entitled either to redemption or a decree for specific performance.

During the time the negotiations were in progress which resulted in the settlement under consideration Edwin A. Warfield was the financial agent of the Union Mutual Life Insurance Company at Chicago, and Robert B. Kendall was the attorney for the company, in charge of its business. After the settlement had been concluded it turned out that certain encumbrances existed against some of the property which were subsequent to the trust deed, but which would take priority to the quitclaim deed executed by complainant and her husband. It therefore became necessary, in order to obtain a perfect title, to go on with the foreclosure proceedings, which was done. A decree was rendered, the property was sold, and upon the expiration of the time of redemption a master's deed was executed. In order to establish an agreement under which the complainant was entitled to redeem, reliance is placed mainly upon the evidence of three witnesses, Julius Kirchhoff, Edwin Warfield, and Robert B. Kendall. The first-named witness testified that he had authority from his wife to settle the matter for her and in all he did he acted as her agent; that the company filed a bill to fore-
472 close the mortgage in July, 1878. He further testified:

About the time the bill was filed to foreclose the trust deed I made a contract with the defendant looking toward a settlement. They wanted a quitclaim on the consideration of the two lots known as the homestead, and we gave a quitclaim deed in 1879, we agreeing to pay them for the homestead whatever the appraisal should be. The corner lot was appraised at \$7,500, and the other at \$2,500; total, \$10,000; to be paid in ten years—\$1,000 per year. They agreed to it, and we gave them a quitclaim deed. Some time after that they tried to foreclose. I asked Mr. Warfield what they meant. He said, It is exactly the same as we made the contract and is all right;

it is better to have it foreclosed to keep the mortgage safe for us. I saw Mr. Kendall, the lawyer of the company. He said there were some judgments against that property, and to make it safer they had to foreclose, and then I need not be afraid; it would be all right. They told me they made out the deeds and sent them to their main office. When they came back during that year they were to be delivered to us on payment of \$1,000. It took some time on account of the foreclosure. It was at six per cent. interest.

Mr. Warfield first saw me in relation to getting a quitclaim before the foreclosure proceedings were commenced. We were to relinquish everything except the homestead; give them a quitclaim and keep the homestead—the two lots. We were to give a quitclaim deed to everything, including the homestead lots, and re-
473 deem the homestead at the appraised value—\$7,500 for one lot and \$2,500 for the other. They were to make a deed out and send it to the company, and upon its return deliver it to us at any time during the year, and we were to pay \$1,000 and \$1,000 a year thereafter until \$10,000 was paid, with six per cent. interest.

I agreed with the company's agent that Mr. Rees should make the appraisal. Warfield, Kendall, and myself went with him. He appraised the corner lot at \$7,500 and the other at \$2,500; total, \$10,000. The terms of payment were ten years' time, \$1,000 the first year, or upon the delivery of the deed whenever the deed was ready, and \$1,000 each year thereafter until \$10,000 had been paid, with six per cent. interest.

Warfield testified: There was an interview at which a proposition was made for the Kirchoffs to make and deliver a quitclaim deed to the company covering all the property embraced in the trust deed, the company to reconvey to the Kirchoffs their homestead. I believe the proposition embraced the lot cornering on the homestead; the conveyance to be made at an appraised value to be placed on the property by James H. Rees. The appraisal was made. The terms, as I now remember them, were \$1,000 cash on delivery of deed from the company, and \$1,000 a year until the property was paid for, together with interest at 6 per cent. on deferred payments. Subsequently Mr. Kirchhoff came with a carriage and took Mr. Rees, Mr. Kendall, and myself to look at the
474 property for the purpose of making the valuation. As near as I can remember, the price fixed was \$7,500 for for the homestead and \$2,500 for the Pine Street lot, making \$10,000.

The witness also testified that the proposition came from the president, vice-president, or chairman of the finance committee while some one of them was in Chicago. He thought Mr. De Witt, president of the company, made it. The witness also testified: "Personally, as agent of the company, I did not make the agreement heretofore testified to. What I did was to submit to the Kirchoffs propositions coming from the company."

Kendall testified that he commenced the foreclosure suit in July, 1878. There had been negotiations before that in regard to a settlement. Kirchhoff then made some arrangement through Warfield,

the financial agent of the company, to redeem his homestead. The witness further testified :

I understood it was agreed that Kirchhoff could redeem or repurchase from the company, at a price to be fixed by appraisers to be selected by the Kirchoffs and the company. These negotiations were not conducted by me. I was only advised of them, as they were going on, by Mr. Warfield and by conversations with Kirchhoff. James H. Rees was agreed upon as the appraiser, and Mr. Warfield, Mr. Kirchhoff, and myself went with him one day and visited all the city property. My recollection is that the price he placed on the homestead lots was \$7,000 for one and \$2,500 for the other. Kirchhoff said he would undertake to pay that if the company would make him a title to it and release him from further liability on his note and trust deed. There was a general understanding
475 that he could buy the property back on those terms, the whole amount to be divided into ten equal yearly payments, at six or four per cent. interest—I don't remember which.

We have not set out all that the three witnesses testified to, as their evidence is quite voluminous. We have, however, given the main features of their evidence relating to the making of the agreement relied upon. If these witnesses are not mistaken, it is apparent that Kirchhoff, as agent for the complainant, made a contract with Warfield, the financial agent of the Union Mutual Life Insurance Company, that he and his wife should convey to the company by quitclaim deed all of the property embraced in their deed of trust, and that complainant was to redeem or receive a reconveyance of the two lots known as the homestead property, for which she was to pay the company the amount at which the lots should be appraised by James H. Reese, payable \$1,000 cash down and \$1,000 annually, at 6 per cent. interest. The contract as detailed by Kirchhoff is plain and definite; it contains nothing uncertain or ambiguous. He says it was made in 1878, soon after the filing of the bill. We have no doubt, when all the evidence is considered, that he is correct on this point—that is, the terms of the contract, as to the property embraced in the deed of trust he had executed, were then agreed upon and understood between him and Warfield; but the contract was not fully consummated until an agreement was reached with Mrs. Diversey as to the property embraced in the deed of trust she had executed. The object seems to have
476 been to not close up any contract with Kirchhoff until a contract was made with Mrs. Diversey. This seems apparent from the fact that Kirchhoff and wife executed and delivered their deed to the company on the same day Mrs. Diversey delivered her deed. It may be that all of the evidence of Kirchhoff is not entirely consistent and harmonious, but his evidence as to the terms and conditions of the contract is not only harmonious, but is consistent with what was done looking in the direction of a consummation of the contract. The lands were appraised as agreed by the person named in the agreement. The complainant executed and delivered their deed to the company as provided in the contract. The foreclosure proceedings were suffered to go on without any objection from the

Kirchoffs, no defense being made by them. The company accepted the deed of the Kirchoffs, under which they parted with all rights of redemption in and to the lands described therein, and it nowhere appears that any consideration existed for that conveyance except the agreement relied upon here to redeem the two lots upon payment of a stipulated sum. Why should the Kirchoffs part with their rights of redemption unless something was to be secured in return? But it is said Warfield's and Kendall's evidence, so far as it tends to establish a contract, is contradicted by their letters and acts after the alleged contract was claimed to have been made. Kendall, the attorney, took no part in making the contract, but, as he testified, understood from the financial agent of the company and from Kirchoff that an agreement had been made—he knew
477 what it was. Warfield testified that personally as agent he did not make a contract; but he says he had propositions from the company which were submitted and accepted. He gives the terms of the contract substantially as given by Kirchoff. Now, if it be true that in the letters and correspondence of the financial agent and attorney with the company may be found statements not entirely in harmony with their evidence, such facts could not invalidate the contract after it was made as disclosed by the evidence of Warfield and Kirchoff. Such facts may somewhat weaken their evidence, but that is all.

As has been seen, Warfield was acting as financial agent of the company; he was entrusted with the management of the company's loans and securities and real estate in Chicago, and when acting within the scope of the apparent power the company will be bound by his acts. *Union Mutual Life Ins. Co. vs. White*, 106 Ill., 67.

But, aside from this, it is apparent from the letters of the company that Warfield had authority to make the contract relied upon. In Jan., 1879, Kendall wrote the company that he would have no difficulty in settling with Kirchoff, but that he dare not settle with him without settling the whole case. In reply to this, Sharp, the vice-president, wrote Kendall to confer with Warfield in regard to a settlement, saying the company would undoubtedly be satisfied with any plan which should have their united endorsement. While this was after the alleged agreement was made, it shows the authority with which the agent was clothed. But,
478 independent of this, the company could not accept and hold the deed executed by the Kirchoffs under the agreement made with the agent and at the same time repudiate the agreement. The acceptance of the deed will be regarded as a ratification of the agreement made by the agent under which it was executed. *T. W. & W. R. R. Co. vs. Elliott*, 76 Ill., 67; *Ewell Evans on Agency*, 65.

But it is said no redemption can be allowed except of the whole premises and upon the payment of the whole debt in money. Where a tract of land has been sold for a specified amount of money in payment of a mortgage and the mortgagor makes application to redeem, in the absence of a contract between mortgagor and mortgagee to the contrary the mortgagor would be required to redeem the entire tract sold and pay the whole of the mortgage indebted-

ness. Jones on Mort., sec. 107-1072. But the doctrine has no application whatever to a case where the mortgagor and mortgagee have entered into an agreement under which a redemption may be made. The mortgagee may by contract extend the period allowed by law for redemption and a court of equity will enforce such an agreement. *Schoonhaven vs. Pratt*, 25 Ill., 457; *Pensonean vs. Pulliam*, 47 Ill., 58. And we perceive no reason why the mortgagee may not accept money or land in satisfaction of a part of the mortgage debt and enter into a valid agreement to — the mortgagor an extension of time to pay a specified sum of money to redeem a part of the premises. No reason is perceived why an agreement to apportion the mortgage debt may not be made and enforced 479 as made. *Dexter v. Arnold*, 1 Sumn., 109; *Howard v. Gresham*, 27 Ga., 347; *Danforth v. Smith*, 23 Vt., 247; *Mutual Mills Ins. Co. vs. Gordon*, 121 Ill., 366.

The quitclaim deed from the Kirchoffs to the company, dated Sept. 4th, 1879, contains the following clause :

"This conveyance is given and accepted in satisfaction of certain indebtedness of the said Julius Kirchoff and Elizabeth Kirchoff, secured by a trust deed on said premises given by the said Julius Kirchoff and Elizabeth Kirchoff, his wife, and Angela Diversey to Levi D. Boone, trustee, dated the 8th day of May, in the year 1871."

And it is claimed that the complainant is estopped by this clause in the deed from setting up the agreement to redeem.

The consideration named in a deed has never been regarded as conclusive on the parties to the instrument. Parol evidence is not admissible to vary or contradict the terms of a deed or other written contract, yet such evidence may be introduced to show the true consideration of a deed, although it may be different from that named in the instrument. *Booth vs. Haynes*, 54 Ill., 363; *Primm v. Legg*, 67 Ill., 500. The clause referred to is a mere recitation that the consideration for the deed was a certain thing which could not be conclusive, and if not conclusive it could not work an estoppel. It is also claimed that complainant's failure to assert the alleged argument in the foreclosure proceedings is a bar to its assertion here that the proceedings in the foreclosure are conclusive. We are unable to

concur in this position. It was a part of the arrangement 480 under which the complainant was to obtain the two lots in controversy that a decree of foreclosure should be entered and that the premises should be sold under such decree. The decree was rendered and the sale made by consent for the purpose of clearing the different tracts of land mentioned in the quitclaim deed from certain incumbrances. The decree was not adverse to the interest of complainant, but in harmony with her interest. She is not attacking the decree, but claiming the enforcement of an agreement under which it was rendered, and in our judgment there is no ground for holding that the rights of complainant were cut off or in any manner impaired by the decree. As has been said before, this record is quite voluminous and there is much that has not been referred to, as a reference to everything contained in the record would extend this opinion to an unusual length. We have

said nothing in reference to the argument that this is a bill for specific performance, and hence falling within the statute of frauds, as we have not regarded it a bill of that character. The substance of the agreement was that complainant was to have the two lots in question, notwithstanding her deed of Sept., 1879, and notwithstanding the decree of foreclosure and sale thereunder, upon the payment of \$1,000 and the execution of her notes secured by a mortgage on the premises for the balance, payable \$1,000 each year for nine years, with six per cent. interest. The witnesses in speaking of the agreement—some of them speak of it as one to redeem, while others speak of it as one to repurchase. Kirchoff says it was to get the homestead back. Warfield said that the

481 Kirchoffs were to be allowed to buy back their homestead.

Kendall, in his evidence, says they were to be allowed to redeem or repurchase; but this is immaterial; the form of the transaction in a court of equity is not to be regarded. The Kirchoffs conveyed away their right of redemption to a number of tracts of land and in consideration they were to have the two lots free and clear from the deed of trust upon payment of a certain sum of money. The deed conveying the right of redemption was accepted by the company and it has been retained by it, and equity demands that it should comply with the contract under which the deed was received. It is claimed in the argument the release of complainant and her husband from personal liability on the indebtedness formed the consideration for the quitclaim deed they executed to the company. A letter written by Kendall Sept. 1st, 1877, to the company would seem to be a complete answer to this position. In that letter he informed the company that there was no personal liability existing against either; that Kirchoff had been through bankruptcy, and hence was not personally liable for the debt, and that Mrs. Kirchoff, having signed the note prior to the act of 1874 relating to contracts of married women, was under the disability of coverture and could not be held personally liable. From this statement it appears that the company knew long before the quitclaim deed was executed that the Kirchoffs were not personally liable for the debt, and, knowing that fact, it is not at all likely that a supposed release

482 from a liability that had no existence formed a part of the consideration for the deed. We think the judgment of the appellate court was right and it will be affirmed.

Affirmed.

State of Illinois Supreme Court, Northern Grand Division.

I, Alfred H. Taylor, clerk of the supreme court in and for the northern grand division of the State of Illinois and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the final opinion of the said supreme court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Ottawa, this 13th day of June, in the year of our Lord one thousand eight hundred and ninety.

A. H. TAYLOR,
Clerk of the Supreme Court.

And thereupon, on the same day, to wit, the 26th day of January, A. D. 1893, the following, among other, proceedings were had and entered of record in said court, to wit :

483 STATE OF ILLINOIS, }
County of Cook, } ss :

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

} 41552, 672. Bill.

This cause coming on to be heard upon the report of I. K. Bayesen, Esq., master in chancery of this court, to whom this cause was refer-ed to take and state on account between the parties, and upon the opinions in this cause of the supreme and appellate court- reversing the decree of this court, heretofore entered herein, in accordance with which opinions this decree is entered, copies of which opinions are, by stipulation of parties, filed herein for reference ; also upon the mandate of the appellate court, heretofore filed herein, upon the exceptions of the respective parties to said report, the stipulations of the parties filed herein, the pleadings, proofs, and exhibits in the cause, and the arguments of counsel, the court doth sustain the exceptions of the complainant to said master's report, so far as the same object to the allowance to the defendant of commissions upon the amount of the rents collected, where such commissions are not shown to have been paid by the defendant, which commission-, with interest thereon allowed by the master, amount-

484 ing to the sum of \$221.53, were improperly allowed by the master, and are hereby disallowed ; and the court sustained the exceptions of the defendant to the said master's report, so far as the said report disallows expenditures by the defendant on behalf of the premises hereinafter described, from the month of August, 1878, to the 10th day of September, 1879, and also an item paid by said company for assessment on April 26th, 1880, said items being shown as Nos. 11 to 16, inclusive, of the statement of defendant attached to said master's report, which items of expenditure should be, and are hereby, allowed to said defendant, together with interest thereon at six per cent. (6 %) from the dates of the said respective expenditures to the date of this decree, said items, together with interest thereon, amounting to the sum of \$1,361.84, and in all other respects all exceptions to the said master's report are overruled, and said report is hereby ratified and confirmed.

And there being exhibited to the court an abstract of the record title of said premises, a copy of so much of which as relates to said claim, next hereinafter set forth, being filed herein, by stipulation, and made a part of this record, from which and from other evidence in the case it appears to the court that on the 19th day of July, 1884, the defendant expended the sum of five hundred (500) dollars to relieve said premises from a cloud upon the title growing out of a

claim in favor of the United States for revenue taxes, and that such payment was a proper expenditure by it as mortgagee, it is ordered that said sum, with six per cent. (6 %) interest thereon from date of payment, amounting to \$755.63, be allowed the defendant.

485 And it further appearing to the court that since the last accounting to the master the said defendant has paid for taxes on said premises the sum of \$307.51, and has received as rents therefrom the sum of \$555.75, it is therefore found that the said complainant is is entitled to an additional credit of \$248.24.

And it is further found that the defendant is entitled to interest on the sum of ten thousand (\$10,000) dollars from the date of said master's report, November 14th, 1891, to the date of this decree, and that the total amount due from the complainant to the defendant upon such accounting, together with interest as aforesaid, is the sum of \$18,858.54.

And the court further finds and orders that inasmuch as defendant has been allowed, as against complainant, the full amount of the special assessments upon the premises in question by it paid that the complainant should be, and she is hereby, decreed to be entitled to have and receive any rebates on such assessments, if any there may be, not collected or accounted for by defendant to complainant.

And it is thereupon herein ordered, adjudged, and decreed that within ninety days from the entry of this decree the complainant pay to the defendant, The Union Mutual Life Insurance Company of Maine, or to Frank L. Wean, its solicitor, the sum of \$18,858.54, with interest thereon at the rate of six per cent. (6 %) per annum from the date of the entry hereof to the date of such payment, and

486 that upon such payment within said period of ninety days as aforesaid the said defendant, The Union Mutual Life Insurance Company of Maine, do at once convey to the said complainant, her heirs and assigns, the said premises described in the bill, to wit, lots two (2) and four (4), in block twenty-one (21), of the Canal Trustees' subdivision of the south fractional quarter of section three (3), township thirty-nine (39) north, range fourteen (14) east, of the third principal meridian, and deliver to the complainant the possession of said premises, free and clear of and from any and all incumbrances or conveyances by it or by any person claiming in its behalf or by, through, or under it, and assign and transfer to said complainant the right to collect and receive any and all the rebates on the assessments aforesaid, and assign to complainant all leases it may hold on any and all of said premises, and account to her for the rents and profits of said premises subsequent to the entry hereof.

And it is further ordered, adjudged, and decreed that in case of a failure by said defendant to make such conveyance and transfer and to surrender possession of said premises upon the tender to it of said sum, with interest as aforesaid, then I. K. Bayesen, Esq., master in chancery of this court, be, and he is hereby, authorized, empowered, and directed to make such transfer and conveyance without further order of court, which conveyance when so made by him shall have the same force and effect as if made by said defendant, and shall be

effective and conclusive without the further order of this court, and complainant shall be at liberty to apply herein for a writ of assistance for the recovery of the possession of said premises.

487 In case said money, with interest as aforesaid, shall be tendered to said defendant or to its solicitor as aforesaid within said ninety days and the defendant or its solicitor shall refuse to receive the same the said money shall be paid into court for the benefit of the defendant, and thereupon the complainant shall be entitled to said master's deed, and upon such payment into court she shall be forever discharged from said indebtedness and the said master's deed shall be delivered as aforesaid, and in case of the failure or refusal of said master to make and deliver said deed as aforesaid, or in case of the complainant's failure to obtain the relief to which she is entitled as aforesaid, she shall be at liberty to apply to this court for further orders and directions in the premises.

It is further ordered and decreed that if said complainant shall make said payment or tender as aforesaid the said defendant shall pay the costs of this suit, to be taxed by the clerk, but in case the said complainant shall fail to make such payment or tender as aforesaid, then her said bill shall be and stand dismissed out of this court and the said defendant shall have and recover from her its costs herein, to be taxed as aforesaid.

The defendant, by its solicitor, having prayed for an appeal to the appellate court of Illinois for the first district, the same is allowed upon the defendant's filing herein within thirty days a bond in the penal sum of \$1,500.00, with surety to be approved by the
488 clerk of the court, and a certificate of evidence to be filed herein within 30 days from the date of the entry of this decree.

And in case an appeal from this decree shall be perfected as above provided the ninety days above limited within which complainant shall tender or pay said sum of \$18,858.54 and interest shall begin to run from the date of the redocketing on notice of this cause after a final disposition shall have been made of such appeal.

And afterwards, to wit, on the 23d day of February, A. D. 1893, the following proceedings were had and entered of record in said court, to wit:

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

} 41552, 672.

On reading the stipulation filed herein it is ordered that the time for filing certificate of evidence be, and hereby is, extended to March 27th, 1893.

And thereupon, on the same day, to wit, Feb. 23d, A. D. 1893, there was filed in said court a certain stipulation, which is in the words and figures following, to wit:

489 STATE OF ILLINOIS, }
County of Cook. }

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF	}	41522, 672. In Chancery.
vs.		
UNION MUTUAL LIFE INSURANCE COM- PANY.		

It is hereby stipulated by the parties hereto that the time for filing the certificate of evidence herein may be extended until the 27th day of March, 1893, and that an order may be entered herein granting such extension.

Chicago, Feb. 21, 1893.

HARBERT & DALEY,
Solicitor for Complainant.
FRANK L. WEAN,
Solicitor for Defendant.

490 STATE OF ILLINOIS, }
County of Cook, } ss :

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF	}	Gen. No., 41522. Term No., 672.
vs.		
UNION MUTUAL LIFE INSURANCE COM- PANY.		

Certificate of Evidence.

Be it remembered that on the hearing of this cause, at a regular term of said court, the following evidence was offered and proceedings had—that is to say :

It is stipulated, for the sake of shortening this record, that the abstract of the certificate of evidence heretofore used on the writ of error in the appellate court and on appeal to the Supreme Court in the original case, which abstract it is agreed substantially embodies the evidence on the original hearing, may be considered herein instead of the original testimony which it purports to cover, except as to Exhibits 33, 51, 55, 59, 80, 164, 85, and 168, F. V. C., to the deposition of Charles L. Drummond; which abstract is in the words following, to wit :

491 CERTIFICATE OF EVIDENCE.

Report of Arno Voss, Master in Chancery, Dated January 30, 1886.

Reports that the testimony has been taken before him from time to time, and that the same has been properly transcribed, and is attached to the report. Also that parties have stipulated to retain their own exhibits.

Stipulation Preceding the Testimony and Attached to the Master's Report and Marked "Exhibit A."

It is hereby stipulated that the exhibits to the depositions offered in evidence in the above-entitled cause may be retained by the parties owning them, and that copies of the same in the body of the depositions, or referred to as exhibits, shall be taken as originals. It is also stipulated that letter-press copies of letters read in evidence by either party shall be considered as originals, and that the copies of the same in the body of the depositions, or set out as exhibits, may be read in evidence with the same force and effect as though the originals were produced, but subject to like objections. It is also agreed that court files in case of Union Mutual Life Ins. Co. *vs.* Kirchoff, in the United States court, need not be attached to said depositions, but that copies thereof in the body of the depositions, and of filing endorsements thereon, may be read in evidence as originals, and subject to the same objections. It is also stipulated that sworn copies of such files, and the endorsements thereon, may be introduced as originals.

It is also agreed by the defendant that any exhibits in its possession will be produced at any time, on request of complainant's solicitor.

Testimony of Julius Kirchoff, Taken April 17, 1883.

My wife, Elizabeth Kirchoff, is complainant in this suit. I have had dealings with the Union Mutual Life Insurance Company, which dealings were made as agent for my wife. On May 8th, 1871, she borrowed \$60,000, Mrs. Angela Diversey, my mother-in-law, and myself joining with her. The loan was secured by a trust deed on land, and I think Levi D. Boone was trustee. I don't remember exactly for how long the loan was first made, nor the rate of interest.

We made a good many payments. I sold one farm in 1872, and made a payment, through Prussing, of about \$3,000, \$1,500 cash and \$1,500 in a note secured by mortgage.

I made some payments afterwards, shown in this paper, marked "Exhibit A." I don't know whether I made any after that or not.

Dr. L. D. Boone, E. A. Warfield and R. B. Kendall were the agents of the defendant here in Chicago. I had most of my dealings with Mr. Warfield, and had some dealings with the others also.

492 The company filed a bill to foreclose the mortgage in July, 1878. The mortgage covered a lot on Rose street, on the West side; a brick building, No. 155 Fulton street; a brick building, No. 39 Linder street, a factory; a brick building on Chicago avenue, near Pine street, and also a corner lot at Rush and Pearson streets, and another adjoining the same—the last two being the homestead—the former being 60 by 144 feet, and the other 39 by 80 feet. The smaller lot is nearly in the rear of the other. The mortgage also covers thirteen and one-tenth acres on

Lincoln avenue and Diversey street, called Lill's old farm; a large parcel on Clark street, in Gardner's subdivision, Lake View, about 144 feet by 596 feet deep. There might be some other lots in the trust deed; I don't remember.

About the time the bill was filed to foreclose the trust deed, I made a contract with the defendant looking toward a settlement. They wanted a quitclaim deed on the consideration of the two lots known as the homestead, and we gave a quitclaim deed in 1879, we agreeing to pay them for the homestead whatever the appraisal should be. The corner lot was appraised at \$7,500, and the other at \$2,500, total \$10,000, to be paid in ten years—\$1,000 a year. They agreed to it, and we gave them a quitclaim deed. Some time after that they tried to foreclose. I asked Mr. Warfield what they meant. He said: It is exactly the same as we made the contract, and is all right; it is better to have it foreclosed to keep the mortgage safe for us. I saw Mr. Kendall, the lawyer of the company. He said there were some judgments against that property, and to make it safer they had to foreclose, and that I need not be afraid; it would be all right. They told me they made out the deeds and sent them to their main office. When they came back during that year they were to be delivered to us on payment of \$1,000. It took some time on account of the foreclosure. It was at six per cent. interest.

Mr. Warfield first saw me in relation to getting a quitclaim before the foreclosure proceedings were commenced. We were to relinquish everything except the homestead. Give them a quitclaim and keep the homestead—the two lots. We were to give a quitclaim deed to everything, including the homestead lots, and redeem the homestead at the appraised value—\$7,500 for one lot and \$2,500 for the other. They were to make a deed out and send it to the company, and upon its return deliver it to us at any time during the year, and we were to pay \$1,000, and \$1,000 a year thereafter until \$10,000 was paid, with six per cent. interest.

I agreed with the company's agent that Mr. Rees should make the appraisal. Warfield, Kendall and myself went with him. He appraised the corner lot at \$7,500 and the other at \$2,500; total, \$10,000. The terms of payment were ten years' time, \$1,000 493 the first year, or upon the delivery of the deed whenever the deed was ready, and \$1,000 each year thereafter until \$10,000 had been paid, with six per cent. interest.

We delivered our quitclaim deed to the company, but the company never conveyed the homestead back. Mr. Kendall and Mr. Warfield said they would make a deed for the homestead and send it to the main office (this was in 1879), and Mr. Kendall told me they had sent it. I never saw the deed.

After we delivered the quitclaim they foreclosed. I asked Warfield what they meant, and he said I need not be afraid; it was better for us. He told me to see Kendall. Kendall said he thought there were some judgments against the lots, and to make it safer they had to do it. It would be better for us, and we should have

the deed after that. Mr. Kendall said it would not affect the contract and would be better for the property.

I had authority from my wife to settle this matter for her, and in all that I did I acted as her agent. We gave the quitclaim deed in order to make a settlement and in consideration that she get the homestead lots back. They never gave back a deed to the homestead. We were always ready to comply with our part of the contract.

Mr. Warfield came to me to solicit the quitclaim deed. The only consideration for that deed was the contract that we were to have the homestead back. They never gave our quitclaim deed back to us. It is recorded.

Mr. Warfield and Mr. Kendall said they had sent the deed to the company, and had not got it back yet. After that Kendall said he had an answer from the company, and they wanted more money. I told him I stuck to my contract, and was ready to comply with my part of it on delivery of the deed. Warfield said it was all right; that I had a right to the contract. I had never done any business with any one except the agents. I told them I was ready, when the deed was delivered, to pay my \$1,000 down, and give a mortgage for the balance, and I have been ready ever since. As I could not get my papers, I brought this suit on the 12th of last June, to stop them from delivering the property to other parties. I told Warfield and Kendall often that I was ready to comply with my part of the contract.

The company got its deed from the master January 21, 1882. The foreclosure was brought in the United States circuit court.

Cross-examination of JULIUS KIRCHOFF by Mr. GROSSCUP:

Mrs. Diversey is my wife's mother. I do not know how many children she had; there are four living. Mrs. Diversey owned a part of the land that was mortgaged. I think only one trust deed was made, and it covered Mrs. Diversey's land. I do not know whether she had any other property not covered by the trust deed or not. We put in everything we had.

494 I understand that this property was bid off by the company at \$17,000. I don't know whether it was as much as it was worth or not. I had an agreement with the company to get it back for \$10,000, and don't know whether that was as much as it was worth or not. I never inquired about the price. I believe it was worth \$10,000. It was sold in 1880. I don't know what its value was at that time. I never trouble myself about values of real estate. I have bought and sold real estate, but know nothing about values in 1880. My bargain was in 1879. I don't know anything about the value of real estate. It is perhaps worth more than \$15,000 now, but I don't know. In 1879 it was not worth so much.

I made all these contracts with Warfield and Kendall myself. My wife never did any business with them. No one else did any business in connection with the homestead but myself. We exe-

cuted our quitclaim deed to the company September 4, 1879. It had been talked about all the time from 1878. I gave the quitclaim on this agreement only, to get the homestead back. Nothing was said about the company selling the rest of the land, and nothing about their going on with the foreclosure. We gave them a quitclaim deed of the whole property, including the homestead, and we were to take the homestead back at its appraised value. All of the other lots were also appraised. They filed a bill in 1878, but I don't know whether it was to foreclose or not. I never looked to see what the bill was for, and never inquired. I was served with process. I thought the notice meant for me to go to court, but never inquired what the proceeding was against me. I don't remember exactly what the bill was for. I may have inquired and I may not. I know the insurance company sold the property in October, 1880. I never knew anything about the proceedings. From July, 1878, to October, 1880, I knew the insurance company had a bill against us, but I didn't know anything about what it was for. I understood they wanted to sell. After we gave a deed, September 14, 1879, I found out they wanted to foreclose. Mr. Warfield told me it was all right, and that Kendall would explain. We had made the agreement before that time. They were to send the deed to the main office, and upon its delivery we were to pay them \$1,000, and \$1,000 each year for ten years. They said at the office it would be better for me to have the company foreclose, as they said there were some judgments against me. This was in September, 1879. I gave the quitclaim deed September 14th. I don't recollect whether the conversation was in 1879 or 1880; I think it was in 1880. The company were to cancel their entire debt against us, except the amount at which the homestead should be appraised would be left for us to pay. They were to have no further debt against us, except the mortgage which we were to give on the homestead.

495 We were to give them a quitclaim deed, and were to buy back the homestead for \$10,000, paying \$1,000 a year for ten years.

The first conversation in regard to the matter was with Mr. Warfield in 1878, I think, at the company's office; I do not know who was present. The agreement was not made then. We talked several times, and the agreement was made in 1878 or 1879; I can't remember. The appraisement was made right in front of the property, Mr. Kendall, Mr. Rees, Mr. Warfield and myself being present. I can't remember where we were when we made the bargain; I shouldn't wonder if we were in the company's office. I do not know who was present; I don't remember whether Kendall was there. Warfield was there. There were frequently other parties present, but I don't remember.

The bargain, I think, was made in the office, and there were several parties present. I don't remember their names; I don't recollect whether I knew them at the time or not. I don't recollect what time of day it was; don't know whether it was forenoon or afternoon. I don't remember whether they talked about anything

else than this bargain; I don't remember whether Mr. Warfield or I spoke about it first; I remember that in the conversation we talked about appraising the property, that I didn't see what they wanted to make trouble by that foreclosure for.

I don't remember what was said the first day; I remember the day the agreement was made he said, after the appraisal, they would send the deed to the main office and have it come back and pay the money. A good deal was said, but I don't remember. We talked several times about it. I don't remember the times, but remember we made the contract, and I think in their office. He said the contract should be fulfilled; we had spoken of the same thing for several days. I do not remember any single conversation we had about the contract. There were several parties in their office, clerks, I think, but I do not remember them. I did the business all with the agent. I know that we made the contract to take the homestead back at appraisal, and that it was one thousand dollars a year for ten years. Mr. Warfield said they would make out the deed and send it to the main office to be executed, and upon its delivery we were to pay them the \$1,000.

I don't know whether there was a judgment against Mrs. Diversey or not. I never heard that the company got one and never heard about it since. I don't know that Mrs. Diversey made a quitclaim deed, and don't know that she made one at the same time I did. I know nothing about her negotiations with the company, although she was on the same debt with me. I never inquired of Kendall or Warfield about it. I paid no attention to her negotiations with the company and knew nothing about them. I did care whether she got out of the loan or not, but I did not know. I got all the money of the loan. I know nothing about her negotiations with
496 the company, and never knew anything about her settlement, and I never inquired of her. We were living in the same house, but I never had any conversation with her about it.

I never tried to settle the matter; they came to me and proposed that we give the quitclaim deed and they give us the homestead. And from 1878 to 1880, when the property was sold, I never had any conversation with Mrs. Diversey in regard to it. I never asked her how she was getting out of the loan, and never bothered myself about it. She ate at the same table with me, and lived in the same family during part of 1879.

I never called to remind Warfield or Kendall what the contract was.

Warfield and Kendall told me there were some judgments against the land, but they were all paid up. I didn't know that, back in 1877, 1878 and 1879, there were judgments against me or my wife or mother-in-law. They were obliged to make a number of parties defendant to the first bill, but the judgment creditors were all settled with, and at the time I thought that by giving a quitclaim deed from myself and wife, I would convey a clear title to the company, except that we were to have our homestead back. I supposed the land was clear, except the company's mortgage. I talked the matter over with Kendall and Warfield, and we all agreed that this

was so. The judgments which were against me had been paid off at that time, though they afterwards told me there were some judgments.

I don't know what was due on the debt at that time; I couldn't give you within \$10,000 of what was due the company; I didn't know. I didn't know the value of the land, except what it was appraised at. The appraisal was in 1879 or 1878; they appraised all of the land covered by the mortgage that day, except Mrs. Diversey's. I don't know whether they appraised hers or not. We were not out there that day. I don't know how much the whole tract was appraised at; I never asked. I think there was a piece of 135 acres included in this trust deed, belonging to Mrs. Diversey; and there were lots 4, 5, 6, 7, 8 and 9, in block 4, in Kenogy's subdivision, belonging to me. I don't know what they were worth. They were not improved. I think Rees' appraisement was in the spring of 1879, but it may have been after November, 1878. I don't remember of going out with them but once. I think Rees appraised the $3\frac{1}{2}$ acres at \$9,000, the other piece at \$15,000, a lot on Rose street at \$1,000, and a lot on Chicago avenue at \$2,000 or \$3,000, I don't remember exactly. I can't tell you what the whole property covered was worth, or what the value of Mrs. Diversey's farm was, or exactly the amount of the debt.

It was understood at the time I gave the quitclaim deed that there were to be no debts against me in favor of the company, except the mortgage on the homestead. I was to give a quitclaim deed and they were to give me back the homestead, and they
497 were to satisfy the debt except the \$10,000 we owed the company for the homestead. The agreement was that the debt was to be satisfied except the \$10,000. Our agreement was that this appraisement by Mr. Rees would settle the whole thing, and that no claim would be hanging over us. We wanted two things: the debt canceled, so that it wouldn't hang over us, and our homestead back; and that was the reason we gave the quitclaim deed. The agreement was that both of these things should be done. The main thing when the property was appraised was the value of the homestead, to make a settlement with them by giving the quitclaim and taking the homestead back. Mrs. Diversey gave in some property too. I don't remember very well whether she gave a quitclaim deed. None of the agreements I have spoken of were put in writing; they were merely verbal, the same as all my dealings with the company since 1871 when we took the money.

Redirect examination of JULIUS KIRCHOFF:

I am a German, and have had some difficulty in understanding some of the questions.

I began talking with Warfield about the arrangement before the bill was filed—before July 11, 1878. We had an understanding from 1878, when they filed the first bill. We had spoken about the quitclaim deed, and then we made the agreement that we should give a quitclaim deed, and have the homestead back at its appraised value. The agreement was made in 1878, when they filed the bill,

and was fully understood before the appraisement. The contract was in no way modified after the appraisal. "We understood it all the time the same." The appraisal determined what the price was to be.

Witness identifies quitclaim deed from himself and wife to the company, and it is introduced in evidence and marked "Exhibit B." (Record, p. 679.)

Adam J. Weckler, my brother-in-law, attended to Mrs. Diversey's business. I never did any business for her. I never read the bill that was filed in the foreclosure suit.

I do not know whether the quitclaim deed was read over to me or not. I think Mr. Rubens acknowledged it at our house. The appraisement was made before the deed was signed, and when we made the quitclaim deed I knew exactly how much we were to pay for the homestead.

The agreement was made before the appraisal. We were to get the homestead back at whatever price the property was appraised. After the appraisal we finished the bargain, and we knew then how much we were to pay, and made up the time at \$1,000 a year.

After that I saw Mr. Warfield and he said he would send the papers up to the main office, and on their return we would
498 get our deed and give them the mortgage. After a while I went up to Mr. Kendall's office and asked him how it was that we heard nothing from the main office about the papers, and he said that there were some judgments against the property and that it would have to be foreclosed and that it would be better for us. The judgments were against both myself and wife, I think. Mr. Kendall said we would have to clear them all up, and that it would take considerable time. He expressed himself as intending to comply substantially with the contract. I said I had made the contract and would stick to it. They said they had made the contract with me, and they had to fulfill it. Warfield often said we had made the bargain and that it was all right.

After that the company came with a force of men, and said they had power to throw everything out of the house, if we didn't go. I told them I had a right to it on account of my bargain. I employed an attorney in the proceedings for restitution in the United States court. That was before the filing of the bill in this case. The company never tendered me a deed to the homestead lots, though I often asked about it.

I put all my property in the trust deed, except a farm which I sold in 1872, paying the proceeds to the company. I forgot to mention that in my former examination. At the time of this bargain with the company a judgment against me would not have been of much value. Still I had a business all the time, and had over \$25,000 invested in it.

There only appeared to be judgments against me at that time; as a matter of fact they had all been disposed of. I think one was on account of a sister-in-law. The company had a good security for its debt.

Witness corrects statement as to what the other lands were appraised at by Rees, as he understood the question to relate to the amount they sold for on the foreclosure proceedings, and answered accordingly.

In 1877 I gave a mortgage on my business for \$6,600 to the Philip Best Brewing Company, and I had some judgments against me. I took that loan for two years. In 1879 I had, I think, \$3,000 more. The first loan was on the bottling department, the last on Clark Street business. I gave judgment notes for the debts. January 31, 1880, I canceled all this, and gave a new mortgage for \$16,000; that covered all my business on Clark street, Monroe street and the bottling department.

I had shares in several mining companies. I figured over \$20,000 in my business, which included these mining stocks under this last mortgage. I was closed up May 7, 1880, and they took everything away. Mr. Warfield and I sometimes spoke about the mortgages on my business.

I lived on the property called the homestead from 1865 or 1866 till the fire; then I built the building that is there now, and lived in it until put out by the marshal the 1st of May, 1882. I have lived in Chicago thirty years.

499 Recross-examination of JULIUS KIRCHOFF by Mr. GROSSCUP:

I do not know how many judgments there were against me in 1878 and 1879, but there were several. They had stood against me for some time. A good many of them were paid finally, but not all. I think some of them were paid in 1879 and 1880. Kendall said they would have to foreclose, for there were some judgments against me; but afterwards said there were none; that they had been paid. He told me that the judgments were all settled up. Mr. Kendall said he had better find out whether there were judgments against the property or not, and he did and found that they were all settled. I don't remember whether I ever saw the deed from the company. I remember I made the contract with them to have no judgments hanging against me, and also to have the homestead; and they told me they had sent the papers.

Redirect examination:

This talk about judgments was after they had filed the bill, and I mean by foreclosure the going on and getting a decree. They said it was necessary to complete the foreclosure, but that there would not be any trouble on account of our agreement which we made with the company; it would not affect the contract at all.

Testimony of Edwin A. Warfield on Behalf of Complainant, October 19, 1883.

Direct examination by Mr. HARBERT:

I am of lawful age; reside in the village of Hyde Park, and am a real-estate dealer. I am somewhat acquainted with Elizabeth

Kirchoff and with the defendant. I am also acquainted with Julius Kirchoff, the husband of the complainant. I was in the employ of the Union Mutual Life Insurance Company. I think the employment began in 1869 or 1870. It is an unsettled question as to when it ended. I was a special agent, superintendent of agencies, and financial agent in Chicago.

The nature of the business transacted by me on behalf of the company here in Chicago was that of financial agent in connection with loans and real estate. My duties embraced the management of the company's loans and real estate.

(Answer objected to, because it does not appear but that his appointment was in writing.)

I was the sole financial agent of the company during the period I was acting for them, and my employment continued until after 1871.

I remember a loan made by the company to Elizabeth Kirchoff, in which Mrs. Angela Diversey was interested, for about \$60,000, about May 8, 1871; and I think that was the only loan made to her for about that amount; though there may have been loans previous.

There were several pieces of property given as security for this loan. There was 120 acres on the Chicago and Northwestern railroad, about sixteen miles north of the city, several lots in Knokke and Gardner's subdivision; one or two lots in Rose's subdivision; two lots near the corner of Rush and Pearson streets, and a lot on Chicago avenue, near Rush street. Don't call to mind any other property just now.

(Objected to as not being the best evidence.)

There was a lot at the southeast corner of Rush and Pearson streets, and there was a lot cornering on that which had a frontage on Pine street in the same block. The corner lot was occupied by the Kirchoffs as their homestead. This loan was never paid off in cash. I don't remember exactly, but think they commenced to make default in interest and taxes prior to September, 1876. Mr. Kirchoff always represented Mrs. Kirchoff in all negotiations. I had frequent interviews with him after the defaults began to be made, and saw him at intervals of a week or two.

Mr. Kendall was local attorney of the company, and continued in that capacity, I think, till after 1881.

The circumstances under which those interviews with Kirchoff took place were that there had been a default in payment of interest and taxes, and the interviews were in regard to their paying them, or some portion of them. There was talk of funding the entire debt into a new loan at four or five per cent. Mr. De Witt, the president of the company, was present at one of these interviews and made such a proposition. There was an interview at which a proposition was made for the Kirchoffs to make and deliver a quit-claim deed to the company, covering all the property embraced in the trust deed—the company to reconvey to the Kirchoffs their homestead. I believe the proposition embraced the lot cornering

on the homestead. The conveyance to be made at an appraised value to be placed on the property by James H. Rees. The appraisal was made; the terms, as I now remember them, were \$1,000 cash on delivery of the deed from the company, and \$1,000 a year until the property was paid for, together with interest at 6 per cent. on deferred payments. Subsequently Mr. Kirchoff came with a carriage and took Mr. Rees, Mr. Kendall and myself to look at the property, for the purpose of making the valuation. As near as I can remember, the price fixed was \$7,500 for the homestead and \$2,500 for the Pine Street lot—making \$10,000.

(Question and answer objected to as irrelevant and incompetent, for the reason that it did not appear that witness had authority to make such arrangements.)

My understanding was that \$1,000 was to be paid on the delivery of the deed, and then I should say \$500 every six months thereafter of principal, together with interest at six per cent.

501 Kirchoff made a quitclaim deed of all the property embraced in the trust deed, and the understanding was that it would do away with the foreclosure proceedings; that Mr. Kendall would dismiss them; but after the Kirchoff deed had been delivered and recorded, Mr. Kendall found that there were certain objections to the title to the property which could be removed by the foreclosure. I notified Kirchoff that the proceedings would go on in order to perfect the title, and referred him to Kendall for particulars. As I remember it now, I told Mr. Kirchoff we would have the deed from the insurance company executed and the mortgage back signed. It is my impression that Kendall prepared the deed and sent it to the company for execution. I did not think it would be necessary to wait until the title was perfected before the deed was delivered. This deed was never returned, to my knowledge, or tendered to Mr. or Mrs. Kirchoff.

I think there was only one quitclaim deed made by the Kirchoffs to the company.

My recollection is that I told Kirchoff that Kendall said the title was not satisfactory to him under the quitclaim, and that he would go on with the foreclosure, and referred him to Kendall for particulars; but I did not understand that it made any difference between us at that time.

These negotiations spread over considerable time. My recollection is that at that time the agreement for the quitclaim deed and the reconveyance of the homestead had substantially been made.

Examination of E. A. WARFIELD, continued June 9, 1884:

I believe I had authority from the company to do all that I did in the matter. This was true with respect to conversations and declarations, as well as acts done by me. This authority was derived from the officers of the Union Mutual Life Insurance Company, either by letters or by verbal instructions, when such officers were here in Chicago. By officers I mean the president, the vice-president, or the chairman of the finance committee.

Cross-examination of Mr. WARFIELD by Mr. GROSSCUP:

My connection with the company commenced in 1869 or 1870. I have stated that it is an unsettled question when it terminated. I am not its agent now. The reason I am unable to state when such agency terminated is other than an inaccuracy of memory. I could state what said reasons are, but will not. It was probably due to a misunderstanding between myself and the company. I cannot state for the company whether friendly relations existed when I ceased to act as its agent; for my own part, there were some matters of which I did not approve. I do not understand that the agency was terminated by reason of this disagreement.

Mr. Julius Kirchoff, husband of the complainant, has business relations with me at the present time. Whenever he sells
502 lots that I have charge of I pay him a commission for doing so. He is not in my employ. I only pay him a commission as a broker, the same as I would any one else who brought me a customer.

My appointment was in writing, and under that appointment I corresponded with the company concerning what I did and what I was instructed to do as their agent here. Mr. Kendall was the company's attorney in Chicago. I do not know that I reported all that I did in this transaction with Kirchoff, but I presume I did. It was my custom to report everything, though it was not absolutely required of me. When I had reported to the company and received instructions, I always followed them, and I believe I did in this case. I do not believe I made an agreement with Mr. or Mrs. Kirchoff, or anybody acting for them, that was contrary to instructions received from the company.

I do not think I made any agreements with them in this transaction that were not first reported to the company; and my correspondence with them and theirs with me would be a correct record of the transactions I had with Mr. and Mrs. Kirchoff, so far as anything in the matter was done by correspondence. I did not in such correspondence mislead the company, or attempt to mislead them. Whatever I stated to them in my letters were the facts in the case at the time such statements were made.

I had interviews with Kendall during the time the foreclosure was going on. I do not think we reported to each other, except in a general way. We acted jointly in the matter in so far as we acted together. I did not attempt to mislead Mr. Kendall or to conceal from him what I was doing, and whatever I stated to him, either by letter or word, were the facts at the time those statements were made, so far as my connection with them was concerned.

The insurance company had several hundred loans, I should say, more or less, and these represented a very large number of people.

To the best of my recollection there was more than one proposition, on both sides, in regard to the settlement of this matter. I believe certain propositions made by Kirchoff are shown in my correspondence with the company. I have stated in a general way in

regard to one of them. There was a proposition made by the president to fund the entire indebtedness into a new loan, upon the same security, at four per cent. interest, but it was never carried into effect, being declined by the Kirchoffs.

There was another proposition that I have referred to, to sell them the homestead at a valuation to be made by James H. Rees, one-tenth down and one-tenth each year thereafter, at six per cent. I cannot state whether the proposition was made by the president, the vice-president or Mr. Secomb, who, I believe, was chairman of the finance committee. It was by some one of these gentlemen
503 while here in Chicago, probably in the office of the company and I was present. I only recollect the place, because most such propositions were made there, and I should presume that this was made there also. I don't remember distinctly as to whether it was made in the office. The language of the proposition, as nearly as I can state it, was, that the insurance company would allow Kirchhoff to retain his property that he called his homestead, at the valuation of the property to be fixed by James H. Rees. I don't remember the time of the year or whether it was summer or winter, or which of the three officers of the company named it was that made it. There was so much business of this kind and one of the three was here nearly all the time, and sometimes all together. I cannot state who else was present.

Kirchhoff said he would do it. He was to give a quitclaim deed and pay a tenth of the appraised value, and a tenth every year until paid for, at six per cent. interest. My recollection is, that he had the option to take the lot upon which his house stood and the lot cornering or fronting on Pine street. He had the option to take one or both. I remember no other proposition except as I have stated. The negotiations covered so much time that it is impossible to state exactly what other propositions, if any, were made. There were a great many pieces of property covered by the trust deed, and, as I understand the negotiations, it was all, including these two pieces, to be quitclaimed to the company on consideration of his being allowed to retain the homestead on the terms stated. It was stated that if the Kirchoffs would quitclaim all of the property in the trust deed, the insurance company would sell and reconvey to them the homestead property at the price to be fixed by Mr. Rees, on the terms already stated. And it was understood by myself and Mr. Kendall that such quitclaim would perfect the title in the company. Kendall afterwards found it would be necessary to foreclose and did so.

Cross-examination of E. A. WARFIELD, continued June 10, 1884:

I do not remember exact dates, times or places, but to the best of my recollection, conversations between Kirchhoff and any one of the officers were in my office. Kirchhoff sometimes visited the office two or three times a week, and during these negotiations may have been there from twenty to fifty times, more or less, and at some of these interviews he met some of the officers of the company, but

the exact dates, times and places I am unable to state. I cannot state positively whether this proposition was ever made more than once, and I am not positive what officer made it, but think it was Mr. De Witt, the president of the company. I cannot state the exact time, but think it was during the year 1878 or '79. I think Kirchhoff and wife executed the quitclaim deed in 1879, and I should say it was made before the execution of that deed, perhaps a few months, or perhaps a year or more. I cannot state positively who was present. There was one or more of the officers of

504 the company, and I cannot state which one, besides Mr. Kirchhoff and myself. My negotiations with Kirchhoff were spread over so much time that it is impossible for me to state anything more than the general substance of the various propositions. I remember a conversation with Kirchhoff about this matter in his saloon, 124 Clark street, where I believe arrangements were made toward going out to appraise the property; but I am giving dates and conversations only to the best of my recollection. I also remember other conversations in the office, but cannot give the dates or what was said, except as stated. I cannot state the substance of any other conversation with Mr. Kirchhoff in any one particular interview, but there were a great many of them, covering a great many things in connection with this loan.

(Witness is handed a letter from John E. De Witt.)

This letter was received by me. I think I know to what Mr. De Witt refers when he says: "We have today written Mr. Kendall that the Kirchhoff offer was declined, and we will not sell for less than \$8,400." I believe it is in answer to a letter from Kendall, in which he enclosed a deed for one or both pieces for the company to execute, in compliance with the proposition to which I have referred, and that the offer referred to in this letter by Mr. De Witt is Mr. Kirchhoff's offer to make the first payment at the expiration of six months, instead of at the delivery of the deed. I understood that Kirchhoff was to pay \$7,500 for one lot and \$2,500 for the other, and believe that Mr. De Witt refused to accept the first cash payment at the end of six months, as suggested by Mr. Kendall in his letter to him. I do not know now and never did understand why he said: "We will not sell the property for less than \$8,400."

I understood at the time that Kendall wrote a letter, enclosing a deed, but do not remember whether he consulted with me in regard to it or not.

Cross-examination of E. A. WARFIELD, continued June 11, 1884:

(Witness identifies a letter and reads the same, which is introduced in evidence, marked "Exhibit A." It is as follows:)

"NOVEMBER 5TH, 1879.

"E. A. Warfield, Esq.:

"We have today written to Mr. Kendall that the Kirchhoff offer was declined, and that we will not sell for less than \$8,400. We

want you to take possession of the house as soon as the matter is closed up. Please advise us.

"Yours truly,

JOHN DE WITT, *President.*"

(Another letter handed witness.)

I believe I received this letter in due course of mail. I believe it to be in the handwriting of a Mr. Cross, and understood it as coming from the company.

505 (Letter introduced in evidence, marked "Exhibit B." The letter is as follows:)

"Oct. 16, 1879.

"E. A. Warfield, Esq.:

"Will you kindly inform us when we may expect to get the Kirchoff loan, 682, in shape for closing it up? We would like this matter wound up at as early a date as possible.

"Yours truly,

JOHN E. DE WITT, *President.*

"C."

(The following letter, marked "Exhibit C," was identified by the witness, which he said he received in due course of mail. Said letter was then read by the witness, and is marked "Exhibit C." It is as follows:)

"DECEMBER 3, 1879.

"E. A. Warfield, Esq.

"DEAR SIR: Your favor of the 26th is at hand in reference to loan 682, Kirchoff. If he does not pay his rent, you have the usual remedy at hand to put him out, and there is no reason why you should not.

"Yours truly,

JOHN E. DE WITT, *President.*

"W. B. R."

I do not remember whether Mr. Kendall submitted to the company the proposition for the repurchase of the Kirchoff homestead or not. I understood that in the letter in which he enclosed a deed for the company to execute, that he made a suggestion as to a change of the terms of payment. I do not believe that I ever saw the letter, though I may have seen a letter-press copy. I do not remember whether the deed enclosed in this letter was made out at \$7,000 or not. I think I would recognize the handwriting of the deed if I saw it.

(Witness is shown a letter-press copy of a letter which he said was written under his direction; that the letter-press copy was made under his direction, and that he sent the original. Witness then read the letter, which is as follows:)

"CHICAGO, ILLINOIS, November 26, 1879.

"I have waited some time, in order that I might be able to report a settlement of 682, Kirchoff, but cannot do so yet. I saw Mr. Kirchoff a few days since, and had him go with me to Mr. Kendall

about it, but found Mr. K. absent. Mr. K. agreed to meet me at Kendall's office the same afternoon at four o'clock, and I have not been able to see him since. He claims that he settled with Mr. Kendall, with the understanding that he was to purchase the homestead on terms submitted some time since by Mr. Kendall, but Mr. Kendall says that such is not the case. I have possession of the house under a lease to Kirchoff, but he does not pay rent worth a cent.

"Yours truly,

E. A. WARFIELD,
"Financial Agent.

"G."

By loan 682 I mean the loan to Kirchoff of \$60,000. I do not remember when the bill to foreclose was filed. The house was occupied in 1879 by the Kirchoffs. I collected some rents from them as receiver appointed by the court. I do not know whether I applied to the court for a writ of assistance to put them out of possession or not. I should say they were in possession up to the time when I resigned my receivership, which was, I think, in September, 1880. I was succeeded by James H. Gallery.

(Witness is shown a quitclaim deed from Kirchoff and wife to the company, already introduced in evidence.)

I think this deed does not embrace all the property covered by the deed of trust. It embraces, I understand, all the property owned by the Kirchoffs and held as security for the debt at the time the quitclaim deed was made. I also understand that the other property mentioned in the trust deed, but not in the quitclaim deed, had either been released or was owned by Mrs. Diversey. The notes were originally made by Mr. and Mrs. Kirchoff, and the trust deed made to secure these notes was made by Mr. and Mrs. Kirchoff upon their property, in which Mrs. Diversey joined with her property, and the quitclaim deed omitted to cover the part mortgaged by Mrs. Diversey to secure these notes. I do not understand that it was agreed, at the time, that the insurance company would take this quitclaim deed in full satisfaction of the entire debt, and release Mrs. Diversey from liability; but I understand that the quitclaim deed from the Kirchoffs was in satisfaction of the indebtedness against them. The indebtedness against the Kirchoffs was the entire indebtedness for which the trust deed was given. I understand the insurance company gave Mrs. Diversey some forty acres of land in consideration of her quitclaim deed, and, in consideration of the Kirchoffs' quitclaim deed, agreed to sell them the homestead as stated. I do not remember the date of Mrs. Diversey's quitclaim deed. I think Mrs. Diversey's deed was executed subsequent to the date of the Kirchoffs' quitclaim deed. I think that the Kirchoffs' quitclaim deed would not release Mrs. Diversey's property from liability if she had not executed one herself. The part I have taken in this case has been that of a witness, and Kirchoff has consulted with me more or less. I have made no offer to compromise. I supposed I had written authority, but am unable to find any. I have

no interest that I am aware of in this case, except I expect to be remunerated for my attendance.

507 Redirect examination by Mr. HARBERT:

The settlement was made with Mrs. Diversey by taking a deed from her for a portion of her property, which was embraced in the trust deed given to secure the Kirchoff loan, the trustee releasing to her the balance and the insurance company releasing the judgment they held against her. It is my recollection that the insurance company entered up judgment against her under a judgment note, but I am not positive. I think forty acres of land in section 23, town. 42, range 13, Cook county, were released to her. It is a little east and north from the city, about half way between Wilmette and Winnetka, on the Chicago and North Western railroad. I believe that this release was made substantially at the same time as the Kirchoff quitclaim deed, and that Mrs. Diversey's quitclaim deed was at about the same time, and that the settlement with Mrs. Kirchoff and with Mrs. Diversey were substantially parts of the same transaction.

The settlement with Mrs. Diversey was by taking her deed for eighty-five to ninety-five acres of land embraced in the trust deed securing the Kirchoff loan, and by releasing the balance to her, and by releasing the judgment held by the insurance company. The settlement with the Kirchoffs was a sale back to them of the homestead property at a price to be fixed by James H. Rees and on terms already stated.

There was clerical error in the description of some of the property embraced in the trust deed, and by the deed from Mrs. Diversey a correction was made. I think her deed was delivered to Mr. Kendall, but I cannot state whether the Kirchoff deed was delivered to Kendall or myself. The deed from Mr. and Mrs. Kirchoff to the company was never tendered back to them to my knowledge, and they were never told, so far as I know, that the company did not intend to comply with its agreement.

When I took the lease to Kirchoff to sign with me, as receiver appointed by the court, I stated to him that the rents he paid on the homestead property would reduce his debt the amount of the sum so paid.

It was not until after the Kirchoff quitclaim deed had been recorded that Mr. Kendall discovered that the title was not perfected by such deed. He then decided to go on with the foreclosure, and served a notice to that effect on Kirchoff. Kirchoff came to me about it, and I referred him to Kendall. I told him it would make no difference as to his right to a reconveyance. The company at that time could not make a good title to Kirchoff of the homestead; neither could Kirchoff make a good title under his mortgage back to the company.

I think Mr. Rees appraised other property at the same time, and the company offered to sell any property that they had title to, at the values of Mr. Rees and Mr. Morey.

508 I did not regard the arrangement with the Kirchoffs as any concession to them, for the reason that if the company held the title to the property, we would have sold it to any one else at the same price and on the same terms.

No conveyance was ever tendered to the Kirchoffs, and no payment demanded, to my knowledge. In about six months or a year the homestead property began to appreciate in value. The company acquired such a title as to enable them to comply with its contract with the Kirchoffs, when the master in chancery executed a deed to it.

The negotiation with Mrs. Diversey began at about the same time as the Kirchoff negotiations, and the agreement with her for the settlement of the transaction covered by the trust deed was fully consummated.

Mrs. Diversey is Mrs. Kirchoff's mother, and all the property in the trust deed belonged to her or to Mrs. or Mr. Kirchoff.

I cannot state how many conversations I had with Kirchoff regarding this settlement subsequent to the commencement of the foreclosure suit, and prior to the issuance of the master's deed, but there were quite a number. I am unable to narrate them, except in a general way. At one time there was some talk of Kirchoff's selling a portion of this property to the parties who owned the adjoining property on the east, when he should acquire title. I should say I saw the Kirchoffs several times in relation to the sale of the east sixty feet of his homestead lots to Mr. Isham, or Mr. Prentice, at their request, and tried to get from him a fixed price at which he would make a conveyance when the title should be perfected, which was to be done, as I understood, by the foreclosure, and the deed from the master in chancery to the company, and by a deed from the company to the Kirchoffs. During all of these conversations I never told Kirchoff that the negotiations were off, and never heard him say anything except in the direction of acquiring title.

The officers of the insurance company were informed as to my negotiations. I cannot remember as to the number of interviews between the officers of the company or the Kirchoffs, or whether they were prior or subsequent to the commencement of the foreclosure suit.

My understanding is that Kendall enclosed a deed in a letter and sent it to the insurance company to be signed; that in that letter he suggested that the Kirchoffs make the first payment at the end of six months, instead of upon the delivery of the deed, and that when the president says the Kirchoff offer is declined he refers to the offer to make the first payment at the end of six months. It was then contemplated that the transaction would be closed without foreclosure.

I believe the president of the company was here during the first week or two in October, 1879, and I think once between that time and the first of January, 1880, and these matters were pretty
599 generally discussed. Kendall prepared the deed from the company to Kirchoff. Daniel Sharp was vice-president in

1879 and 1880; was here at various times during those years, and I received oral instructions from him in regard to business.

I think I made no arrangement in regard to loans or settlements, and especially in regard to the transaction in question, which I did not communicate to the company, either by letter or through its officers orally.

In regard to a letter to which my attention has been called, in which I say that Kirchoff claims that he settled with Mr. Kendall, and that he was to purchase the homestead on terms submitted some time since, I call to mind no difference between Kendall and Kirchoff with reference to closing the transaction, except the time of the first payment, and I think Mr. Kirchoff understood he had settled with Mr. Kendall on the basis of paying the money at the end of six months, and Kendall said he had not, but that he submitted the question to the company.

At the time the master's deed was obtained the property had appreciated in value.

Recross-examination of Mr. WARFIELD by Mr. GROSSCUP,
June 25, 1884:

Personally, as agent of the company, I did not make the agreement heretofore testified to. What I did was to submit to the Kirchoffs propositions as propositions coming from the company. I cannot state positively, but I think that at the time I informed Kirchoff that they were propositions coming from the company. I cannot state positively from what officer this proposition came to me to be submitted, but the probabilities are that it came from Mr. De Witt. I cannot state whether it came to me orally or in writing, as I received propositions in both ways. I cannot state the date at which Mr. De Witt gave it to me, but presume it was in 1878 or 1879. In every case when I spoke to Kirchoff about the proposition he said he would do it; it was accepted then. Whatever I did in the matter was communicated to the company or its officers. I cannot state in just what way it was communicated without seeing the correspondence, if it was a matter of correspondence, or if it was a matter of personal conversation I cannot state more definitely than I have already stated. I have some recollections about the matter, it spread over so much time, and on more than one occasion I probably got out of patience with the Kirchoffs waiting for the matter to be closed up. To the best of my recollection this matter covered nearly three years, and there were a large number of personal interviews. It is impossible for me to recollect the dates and places; I have stated as near as I can remember, but I have some recollection of getting out of patience on more than one occasion, and advising some course to be pursued to close up the matter, as the company were pushing me to get a settlement. And I believe, on one occasion, I thought the shortest way would be a foreclosure.

When the proposition was made Kirchoff said it was all right; that he would do it; but time dragged along, and I received, to the best of my recollection, several letters urging me to get the

matter settled up, which may have been one year or two years, or longer, from the date of the original agreement.

I do not remember the date when Kendall sent the blank deed to the company, but think he informed me at the time. I could not state what the consideration named in that deed was; I have an indistinct recollection that the deed covered but one lot, and that there was to have been another deed for the other lot, but this is not very clear in my mind now. I should say the deed was sent as coming out of the proposition that I had made to the Kirchoffs, but it was sent by Mr. Kendall, and I cannot state what he said to Kirchoff at the time.

I believe I was in the employ of the company at the time of the original loan to the Kirchoffs, though not in Chicago. I do not know who got the money. The notes, I think, were executed by Elizabeth Kirchoff and husband.

I believe a judgment was taken against Mrs. Diversey upon the judgment note, secured by the trust deed in 1878, for about \$80,000.

It is my understanding that it was also agreed that the company should release its lien upon the property of Mrs. Diversey, acquired by the trust deed and the judgment entered up against her. Nearly all of the negotiations in regard to the judgment were made by Mr. Kendall; but it was my understanding that the negotiations resulting in the quitclaim deed from the Kirchoffs and Mrs. Diversey contemplated the relinquishment of all liens that the company had upon their several properties, and I believe these negotiations were substantially one matter.

I cannot say whether the Kirchoffs would have executed their quitclaim deed upon any other conditions than that the company should release its lien against their property and against Mrs. Diversey's. I understand that Kirchoff executed a quitclaim deed to the company in satisfaction of the indebtedness against them and with the understanding that they could buy the homestead back, as stated; and that Mrs. Diversey gave a deed to the company with the understanding that the judgment against her should be released and that she should be allowed to retain about forty acres of the property mortgaged by her.

The Kirchoff quitclaim deed, as I recollect it, stated that it was in satisfaction of the indebtedness against the Kirchoffs; and I think the deed from Mrs. Diversey was in consideration of the company releasing the judgment against her, and allowing her to retain forty acres of land that the company held as security for the Kirchoff loan.

511 I cannot state whether what the Kirchoff quitclaim deed expressed upon its face in regard to being in satisfaction of the entire loan was true or not, as the matter of its preparation was conducted by Kendall. Kendall wanted the quitclaim, to save the expense of foreclosure, as it would cost about \$1,100 to procure the necessary abstract. The agreement with Kirchoff was made about that time. Afterwards Kendall succeeded in getting copies of the abstracts, and found it would be necessary to proceed with the foreclosure.

The giving of this quitclaim deed was a part of the proposition

that I submitted, and I supposed it was in satisfaction of the debt against the Kirchoffs.

If I received a letter from the company stating that they would not reconvey the homestead for less than \$8,400, I think I afterwards did nothing contrary to that letter. I did not have free access to Mr. Kendall's correspondence with the company, but my own I had personal charge of, and I followed out the intentions, purposes and instructions of the company expressed in the correspondence so far as I was able to. I regarded the letter from the company dated December 3, 1879, as a suggestion that in case Kirchhoff did not pay his rent I should put him out. The only time that I remember telling him that the rents he paid were to be applied as payments on the property was at the time he signed the lease. I do not think I told him that afterwards. The lease was in writing, and I do not think it said that the rents were to be applied on payment of principal, but that it spoke of the rent as rents.

In my letter of November 26, 1879, where I say that Kirchhoff claims that he has settled with Kendall with the understanding that he was to purchase the homestead upon terms submitted some time since by Mr. Kendall, I only knew, in regard to the terms submitted, that the first payment was to be made at the end of six months, instead of the beginning. As I recollect it, Kendall said he submitted that as a proposition, and Kirchhoff thought it had been agreed to. I have no recollection of any other controversy between them. Kendall said to me he had not settled with Kirchhoff, fixing the time of payment at the end of six months, instead of the beginning, but had submitted it to the company. My recollection is not particularly clear that that was the point of the letter, namely, simply the difference between the first payment being cash or in six months. But I do not see what else it could refer to. I do not remember what claims Kirchhoff made in regard to it. I went to see him and he told me he had fixed the matter with Mr. Kendall; not having been apprised of any arrangement, I took him into Kendall's office, but Kendall was absent. I then made an appointment with Kirchhoff to meet me there again, but he did not keep it; but Kendall told me that he had not settled the matter, but had written to the company suggesting a change in the terms of payment.

I went to Kendall, because it was my custom to do so, in regard to matters which we were negotiating jointly. I have repeatedly stated my relations in regard to these negotiations to be that I submitted propositions from both sides.

Kendall understood the matter as thoroughly as I did myself, and I have no doubt that the matter of the first payment to be made in advance was talked over between us on quite a number of occasions, and Mr. Kendall understood it just as well as I did. For some reason Kirchhoff desired a change and saw fit to consult with Mr. Kendall in regard to it. When I made the proposition I understood that the first payment was to be in cash on delivery of deed.

The proposition was to purchase the homestead at Rees' valua-

tion, the terms to be ten per cent. cash and ten per cent. a year until paid, with interest. After some time had elapsed Kirchhoff was under the impression that the first payment was to be at the end of the year instead of at the beginning, and though he had fixed the matter with Kendall by making it at the end of six months, Kendall said such was not the fact, but that he had written the company suggesting that they accept the payment at the end of six months.

Further redirect examination of E. A. WARFIELD by Mr. HARBERT, June 27, 1884 :

(Stipulation that the homestead property heretofore testified about is the two lots described in the bill.)

All the correspondence between myself and the company is in the hands of the company. The consideration for the Kirchhoff quitclaim deed was the reconveyance of the homestead and the release from liability on the debt. I think Mrs. Diversey signed the notes in connection with the Kirchoffs.

I received written and oral instructions about this and other matters, and endeavored to carry them out. In cases where it was necessary I exercised discretion.

In regard to the controversy as to when the first payment should be made, I never regarded it as a serious matter and do not think the Kirchoffs insisted upon it. My understanding was, that they were to have back one or both pieces, as they saw fit, at the appraised value. I do not think but one piece was embraced in the deed, and do not know that any other deed was ever made out; but in regard to the other piece, in case Kirchoffs did not take it, it was to be sold at the price fixed by Rees.

Further redirect examination of E. A. WARFIELD, March 9, 1885 :

Referring to my letter of November 26, 1879, set out in my cross-examination, in which I speak of taking Kirchhoff to Kendall's office and finding him absent, I would say that my purpose in going there was to satisfy Kirchhoff in regard to the foreclosure proceedings. He had met me a few days before and asked me why they were going on, inasmuch as he thought he had settled the matter by his agreement to purchase the homestead property, and as the foreclosure was in Kendall's hands, I wanted him to explain it. Kirchhoff understood that the agreement between himself and the company was to do away with foreclosure proceedings. This interview with Kirchhoff was some days before November 26, 1879. After receipt of the letter from Mr. De Witt to me, dated November 5, 1879, I proceeded to carry out the agreement so far as I was able. The agreement was that Kirchhoff was to pay one-tenth of the price upon the delivery of the deed from the insurance company, and, as I recollect it now, Kirchhoff went to Kendall to see if the agreement could not be modified, making the first payment at the end of six months; and I believe Mr. Kirchhoff understood that

that was satisfactory to Kendall and so stated to me. I meant in my letter that Kendall said he had not changed the original agreement. At the date of this letter, November 26, 1879, I do not recollect that there was anything further that Mr. Kirchhoff was to do under his agreement which he had not already done. I know now that I did not apply for a writ of assistance to put Kirchhoff out of the house. At the time of the delivery of the Kirchhoff deed to the company, I understand that all of the terms of agreement were definitely understood.

I do not remember definitely, but think Kirchhoff paid me two or three hundred dollars under his lease. As already stated, I told him at the time he executed the lease that his rents would reduce the amount of his indebtedness under the agreement. I had general instructions in regard to selling real estate at the price fixed by Mr. Rees and Mr. Morey. I made the sales and reported them to the company. I had general instructions to that effect in reference to all of the property of the company here.

Whenever Mr. Sharp, the vice-president, was here, and this matter was talked over, I endeavored to carry out his instructions. I do not remember any particular instructions from Mr. Sharp, but he was fully advised of the situation whenever he was here.

In regard to the letter from De Witt to Kendall, dated August 3, 1877, in which he says: "At a meeting of the finance committee this morning we considered the matter of the Kirchhoff loan, and propose to let him have his own way about it, but get the time reduced to five years if you can. The reasons moving the finance committee in this matter are simply these: They deem this the easiest and quickest way to get title to the property," etc., I will say the same reasons submitted at the date of the agreement with Kirchhoff and had some influence in the matter.

By my answer to a question on the cross-examination, in which I stated that I told Kirchhoff that the rents which he paid
 514 would reduce the amount of his debt, I meant that such amounts could be applied on the purchase of the homestead, as per agreement.

The instructions under which I acted were not always in writing. I also received oral instructions from the officers.

The amount of money the company had loaned at the time which was under my charge was between three and one-half and four million dollars, averaging, I should say, from three thousand to four thousand dollars in each loan.

(Defendant objects to proving the authority of the agent by the testimony of the agent.)

(Complainant introduces in evidence the answer of Julius Kirchhoff, filed by him in the United States court November 16, 1881 to the petition of James R. Page, receiver, for a writ of assistance. This answer sets up as a defense to the petition an agreement between him and the insurance company, substantially the same as that set forth in the bill in this case.)

Direct examination of ROBERT B. KENDALL, on behalf of complainant, October 7, 1884, by W. S. HARBERT:

I am of lawful age. Reside in Chicago. Am acquainted with the parties to this suit, and from 1875 to 1881 was in the employ of the defendant as its attorney, at first in the city of Boston, and from 1876 to the winter of 1881 in Chicago. I was in charge of making collections of loans, foreclosing mortgages and trust deeds, and had sort of general supervision over the titles of the property owned by the company. Had something to do with their sales, and acted as general solicitor for it in all legal matters in Chicago and vicinity.

I recollect the Kirchhoff loan for sixty thousand dollars. It was made in May, 1871, I think, secured by promissory note of Kirchhoff and wife and Mrs. Diversey, who was Mrs. Kirchhoff's mother, and by a trust deed executed by the same persons to Levi D. Boone, conveying a large amount of property in Chicago and vicinity. There never was more than one such loan, to my knowledge. The title to the property in the country in the town of New Trier was in Mrs. Diversey, but most of the rest of it was in Mrs. Kirchhoff. There were some lots to which Kirchhoff claimed the title, but, as I recollect it, his title failed. Most, if not all, the city property belonged to Mrs. Kirchhoff. The loan was not paid at maturity, and there were large arrearages of interest, taxes, etc. In pursuance of my general instructions as attorney for the company, I commenced foreclosure suits in the United States circuit court in July, 1878. There had been some negotiations before that in regard to some terms of settlement to avoid foreclosure proceedings, but they did not seem to be able to carry out the terms talked of, and I commenced suit. Mr. Kirchhoff then made some arrangement through 515 Mr. Warfield, I think, the financial agent of the company here, to redeem his homestead. I understood it was agreed that Kirchhoff could redeem or repurchase from the company at a price to be fixed by appraisers, to be selected by the Kirchoffs and the company. These negotiations were not conducted by me. I was only advised of them as they were going on by Mr. Warfield and by conversations with Kirchhoff. James H. Rees was agreed upon as the appraiser, and Mr. Warfield, Mr. Kirchhoff and myself went with him one day and visited all the city property. My recollection is, that the price he placed on the homestead lots was \$7,000 for one and \$2,500 for the other. Kirchhoff said he would undertake to pay that if the company would make him a title to it and release him from further liability on his note and trust deed. There was a general understanding that he could buy the property back on those terms, the whole amount to be divided into ten equal yearly payments, at six or four per cent. interest, I don't remember which.

I was present at several interviews between Kirchhoff and Warfield, and suppose I took part in the conversation. It was thought that the Kirchoffs would execute their deed to the company of all the property belonging to them involved in the mortgage, and the

company would reconvey the homestead lots, taking a mortgage back on deferred payments. The matter hung fire a good while, partly owing, I think, to Kirchoff not being ready to make the first payment, and I went on with the foreclosure. The case was pending until 1879, when I was urged by Warfield and Kirchoff to prepare the necessary papers for carrying out the agreement. I prepared the quitclaim deed from Kirchoff and wife covering the whole property, and the deed from the company for the homestead lot at the corner of Rush and Pearson streets. I sent the Kirchoff deed to Mrs. Kirchoff for execution, and the draft of the deed to the homestead to the home office at Boston, for the company to execute, with a letter in relation to it. Kirchoff then wanted the first payment, instead of being made in cash on delivery of the deed, to be postponed to the end of the year, and finally said that if it could be put off until spring, he would make it then. I wrote to the company, stating that Kirchoff wished to make the modification. I recollect I told Kirchoff I didn't think the company would do it, but to gratify him I wrote the letter. In due course of mail I received a reply declining to accede to his request, and informing me that they would require a larger portion of the purchase-money paid in advance than had been talked of. I think they said they would require one-quarter in advance. Anyhow, they made a material change in the terms of payment, and I don't know but they changed the price.

Kirchoff kept the deed I gave him to execute nearly two months, but finally brought it back executed and acknowledged. I
516 then prepared the deed from the company to Mrs. Kirchoff, and forwarded it, as before stated.

It was the purpose at the time to avoid foreclosure proceedings. I made a lot of judgment creditors parties. But Kirchoff assured me that the judgments had in fact been settled. I examined the records and satisfied myself that the judgments had been discharged since the abstracts had been made up, and I therefore saw no reason why the company could not settle the matter by taking a deed from the Kirchoffs and making a deed to Mrs. Kirchoff, taking her mortgage as security, as had been previously agreed upon. But, upon making a re-examination of the abstracts of title, I found an outstanding title through a sheriff's deed to one Stanford, issued on a judgment recovered against Mrs. Kirchoff some years previous, in favor of Eben F. Runyan, and I saw no way of getting a good title except by having the property sold under a decree, and so amended the bill for that purpose, making Runyan, his assignee in bankruptcy, Jenkins, and Mr. Stanford defendants. Runyan was a non-resident, and in such case the law required notice to be served upon the occupant of the property. Kirchoff was the occupant, and when served with this notice came in to find out what it meant, claiming that he thought everything was to be settled without foreclosure, and I explained it to him, telling him it would be better for him and for the company, and would make no difference except delaying the consummation of the arrangement with him.

Kirchoff wanted to redeem the two lots together. The reason

that the deed sent to the company for execution only embraced one lot was, because I thought it was as much as Kirchoff ought to undertake, and I tried to dissuade him from buying back the other for that reason, thinking that one at a time was as much as he ought to undertake. I know he seemed to find it difficult to raise the money for his first payment. I don't understand that he ever gave up the intention of buying back the other lot. The deed from the Kirchoffs was filed for record.

One or more officers of the company were here a great deal of the time during the period referred to. I do not recollect that I myself ever apprised them of what had been done in relation to this matter, except by the letter enclosing the deed. I may have written then and may not. It was my custom to apprise them, when here, of the condition of matters, and also of the condition of any contract in the process of completion. These reports were made either orally or in my correspondence. I was also in the habit of making a report each month of the work I was doing in my office. My business was in the legal department, foreclosing mortgages, etc., and only related incidentally to the selling of property. Warfield was the agent for negotiating for sales and settlements. What I did in this matter was done in pursuance of advices from Warfield. He

517 was urging a settlement of this Kirchoff matter and pressing me to close it as far as I had anything to do with it. I do not recollect of any conversation with the Kirchoffs in regard to having money they paid as rent applied on the redemption money.

After the letter from the company declining to reconvey, I do not recollect that I received any instructions from anybody with reference to this matter. I went on with the foreclosure as a matter of course, and did not do anything, after that, with reference to the agreement with Kirchoffs, that I know of.

I received the deed from Kirchoff before I prepared the deed of the lot to Mrs. Kirchoff.

Kirchoff was living on the homestead. At the time my relations with the company terminated the property had been sold by a master in chancery, October 20, 1880, and the sale confirmed, and the company would have been entitled to a deed January 20, 1882; the master's deed was executed January 21, 1882.

I had authority to do whatever I did in relation to the Kirchoff loan.

Mr. John E. De Witt was president, Mr. Daniel Sharp vice-president, of the company. Mr. Edward R. Secomb, one of the directors, was here frequently for several years. Mr. Warfield was financial agent. His duty was to exercise a general supervision over the investments of the company, collect interest of loans and negotiate for the sale of property. He was very busy all the time over those matters. I received oral directions from the officers of the company when here, and acted upon them to the best of my ability. Whatever I did in connection with this matter was pursuant to general or specific directions from the officers of the company. Of course many things were left to my discretion.

The offices (including mine, Warfield's and the insurance agent's) of the company were at 133 La Salle street. It was the habit of Mr. Warfield and myself to work together, and in this particular matter we were in frequent conversation from time to time. All the various aspects of the Kirchoff loan were also discussed by us with the officers of the company, with the president, and, I think, the vice-president. I don't recollect any particular time or place. I think it was well understood by the president of the company, and possibly by several of the other officers, that Kirchoff was to be allowed to buy back the homestead. I understood it as a settled matter, and although it hung fire for a long time, I never understood that it was abandoned until the receipt of the letter from the company refusing Kirchoff's offer. The company never tendered back to Kirchoff a reconveyance of the property, and never tendered back his quitclaim deed. I never understood that Kirchoff declined to go on with the contract.

I amended the bill, making Runyan and others parties, in January, 1880. I don't know what the intention of the company was at the time, except as gathered from the letter which they
518 wrote me declining to make the modifications in the terms of payment. After that Kirchoff expressed himself as still willing to go on with the contract.

The agreement with Mrs. Diversey was distinct from the Kirchoff agreement. I made a sort of compromise with her, allowing her to keep a portion of her land, and she made a deed of the rest of it to the company, with the understanding that she would be released from personal liability. This agreement was made at about the same time with the Kirchoff agreement, but was conducted independently, and I do not know that Kirchoff knew about it.

The intervening lien under the judgment sale was what rendered foreclosure necessary. This would have affected the lien of the mortgage back from Kirchoff. Kirchoff always displayed a good deal of anxiety to redeem this homestead property, and always expressed himself as entitled to such redemption. The company parted with no other consideration for the quitclaim deed from Kirchoff than the settlement of the claim under the trust deed, and the agreement with Kirchoff for a reconveyance on the terms named. The Kirchoffs had no other real estate that I could discover. The company never, to my knowledge, tendered a deed of the two lots to the Kirchoffs, or requested a mortgage from them for the deferred payments. I do not recollect of ever informing Kirchoff that the company would not carry out its agreement.

Cross-examination of ROBERT B. KENDALL by EDWARD R. SWETT, November 14, 1884:

I was employed by the company as general solicitor and attorney for it in connection with their business matters in Chicago and the West. My authority was the same as that of any attorney who has business put into his hands. I had charge of the foreclosure of mortgages especially. The company had a financial agent in Chicago. I was not authorized to make a sale of real estate without

referring the matter to the company for their approval, and I never exercised authority to compromise a foreclosure case without having received such authority from the company. I acted under general instructions, or what I considered such, by virtue of my position, and such special instructions as were received from time to time.

I never considered that my authority, under my general instructions, extended so far as to authorize me to compromise a pending foreclosure suit, or to make a sale of real estate without consulting the company.

It was my habit to advise the company, either by letter or written report, of all the important transactions made by me as their attorney. During the larger part of the time of my administration of the office I made regular monthly reports in writing, which were designed to keep the company advised of what I was doing. If I made any important negotiation or agreement in regard to a certain property, it would most likely appear in these reports, or in my correspondence, or in both.

519 I do not know when or where the agreement with the

Kirchoffs was made, and did not make it personally myself. I do not know that I was present when it was made originally, but was present on several occasions when the matter was referred to as an agreement that already existed. At the time we went with Mr. Rees to make the appraisement I understood that the visit was made pursuant to an understanding arrived at between Warfield and Kirchoff, that Kirchoff should have the opportunity of taking this property in the way already stated, and I know that when I informed Kirchoff of the amount put upon the property he signified his satisfaction.

The appraisal was made soon after the foreclosure proceedings were commenced, and those proceedings probably stimulated Kirchoff to come to some understanding.

This loan involved about sixty thousand dollars, and was a matter about which the company was very much interested, and, perhaps, anxious, and there was, probably, considerable correspondence in relation to it.

I do not know whether the company ever authorized this agreement. My testimony is made from memory, refreshed only as to dates by some notes that I made in regard to the foreclosure proceedings. I think the negotiations commenced in 1876. I don't think that Kirchoff was frequently in the office; I think that Warfield used oftener to run after him. I have no recollection now of the agreement for redemption of the homestead ever being brought to the knowledge of any officer of the company, except possibly by my letter enclosing the deed to Kirchoff. There was a prior proposition to extend the loan for a period of years, but it was never carried out.

(Witness identifies the letter written to him by the company, dated August 3, 1877, in which De Witt says the company propose to let Kirchoff have his own way about the loan.)

Mrs. Diversey also signed the \$60,000 note. I entered up judg-

ment against her for the full amount. She was Mrs. Kirchoff's mother. I never remember Kirchoff expressing a desire that his mother-in-law should be released.

A settlement was finally made with Mrs. Diversey by which she retained part of her property and quitclaimed the remainder to the company. Kirchoff did not enter into the negotiations with Mrs. Diversey.

(Witness identifies letter-press copy of letter from him to company, dated September 18, 1877; said letter is as follows:)

"We found so many diverse and adverse interests in the Kirchoff case that it has been impossible to so harmonize them as to effect a settlement on the basis proposed by the president when here. Son-in-law Weckler has advised mother-in-law Diversey not to
520 make herself liable a second time for her son-in-law Kirchoff.

Hence she has declined to do more than sign a \$10,000 note, secured by a trust deed on her farm.

"This did not seem to Mr. Warfield and myself a sufficient inducement to release her from her liability for over \$75,000 on the note we now hold, upon which we could enter up a judgment any day which would be a valid lien on the farm whether our trust deed is so or not. Mrs. Diversey acts under the advice of Weckler, and Kirchoff has no influence with her whatever.

"We had an interview, yesterday, with Weckler, at which he said that a \$10,000 mortgage on the farm and her release from any further liability was their ultimatum, but when I told him that in that case we should enter up judgment against Mrs. Diversey on our note, we thought he exhibited signs of weakening. He began to refer to a suggestion of mine, some time ago, for a \$15,000 loan on the farm. I think they would give it. I think they are anxious to get Mrs. Diversey released from her liability on the old note; and I suspected from his manner, that he did not know until then that we held her judgment note. He told us of some other land she owned, which he said was unincumbered, lying near the farm.

"After having alluded to the matter of taking judgment against her, we thought it would be best to clinch the matter by entering it up at once, and I accordingly entered up a judgment against Mrs. Diversey alone for the sum of \$75,696.89, principal and interest due, and also for fees and costs, and ordered an execution.

"Kirchoff has been through bankruptcy since he gave us that note, although he has not got his discharge. I see, from an examination of the case, that his discharge was applied for long ago, and that the register reported in favor of it, and that there was no opposition. It would therefore seem that he can get it any day. He is probably unwilling to settle the costs. At the time the note was signed Mrs. Kirchoff had no capacity to make a contract, except as to her separate estate, on account of her coverture, and I do not think a judgment against her would hold.

"Married women were at that time, in this State, still under the common-law disabilities, as to making contracts (except as I have mentioned). Her trust deed, executed with her husband, would

probably be good, but her note, not being a contract relative to her 'separate estate,' would not be worth a cent.

"Therefore, I thought it best to take judgment against the widow Diversey alone.

"I think it very likely that the parties will now come to time, upon most any reasonable basis. I infer so chiefly from Weckler's manner when I mentioned judgment to him yesterday. At
521 any rate, we have a pretty solid lien on the farm and upon any other real estate of Mrs. Diversey."

Up to the time of this letter I think there had been no agreement made for the quitclaiming by Kirchoff, and for their redeeming of the homestead. The matters alluded to in this letter relate to the negotiations before stated for giving new mortgage papers for the entire indebtedness.

(Witness identifies a monthly report in his own handwriting, dated November 25, 1878, and reads a portion of it as follows:)

"I have had several interviews with Kirchoff relative to loan 682, hoping that we might effect a settlement of the matter without the delay of a chancery foreclosure. He would like to redeem his homestead and the adjoining lot, and also the Diversey farm, and surrender the rest; but Mrs. Diversey, his mother-in-law, who owns the farm, is under the influence of another son-in-law, Weckler, who is somewhat hostile to Kirchoff, and I think advises the old lady not to agree to it. I think Kirchoff would give \$25,000, long time, at four per cent., with ten per cent. of principal annually, for the homestead and farm; the first valued at \$10,000 (two lots) by Rees, and the farm at \$20,000 by Rees, which Mr. Warfield thinks is too high. He offers \$20,000, but I have told him I won't forward an offer for less than \$25,000, and would not assure him of the acceptance of even that. This arrangement has in view the releasing of an old trust deed prior to ours, of which you are informed, and the correction of the description in deed of the farm, and deed of all the other property covered by the trust deed, on their part, and cancellation of the indebtedness and of the judgment against Mrs. Diversey on our part. What would be the views of the company in this regard, provided it can be done?"

I think the agreement for the redemption of the homestead property had been made before the writing of this letter, because I am very sure that the appraisement had been made prior to this time.

(Witness identifies a letter-press copy of a letter from him to the company, in his own handwriting, dated January 1, 1879, and reads parts of said letter as follows:)

"There has not been much delay in the Kirchoff case, except that Mr. Barber, counsel for Diversey, was running for Congress, and I was obliged, as a matter of courtesy, to grant him a little extra time in which to prepare and file his answer. That, however, has been done, and the case is at issue, and will be referred to a master to take proofs and report. If the case then develops great difficulty, I will retain Mr. Sleeper, but in its present shape I do not think it

necessary. I had hopes of effecting an amicable settlement and avoid litigation, but have not got such terms from Diversey as to care to submit them. The son-in-law of Mrs. Diversey, Weck-
ler, says that it is with her a question of saving something
522 from the property she pledged for Kirchoff's debt, and that if we are not willing to concede anything, she will fight for what she can get. I think now that an offer on our part to let her keep forty acres of the farm would induce her to give us a deed of the rest, although she has not said so. Weckler, with whom I have had several interviews during the last month, offered, on her behalf, to divide the farm, which contains 130 acres. You are, I think, sufficiently informed of the various complications in this matter, so that I need not state them fully. I explained them fully to Mr. Sharp, and have written fully to the company. I think we can maintain our case in court, but we may have a long siege of it. Kirchoff would willingly surrender all his property and buy back his homestead at a liberal price, but I do not dare to settle with him without settling the whole case, as it might prejudice our claim against Diversey. It is rather unfortunate now that we released part of the security without adequate consideration, thus leaving more than a fair proportion to be satisfied out of the remainder, and we cannot safely take Kirchoff's property for a certain part of the debt, and then hold Mrs. Diversey for the balance. It would give cause for complaint on her part, and our idea of the relative value of the different parcels of land might not be sustained by the court. A receiver of the property has been appointed, and the rents will be collected by him. Kirchoff has taken a lease of his house from the receiver. I wrote in my report for November about this case, and the matter was referred to the vice-president, then here, but he did not appear to favor a settlement involving concessions on our part. Of course any settlement would involve some concessions on both sides. If it is not thought advisable to negotiate, I will give no further thought to the subject, but will push the court proceedings as fast as may be, but I would like an expression of your views in the matter."

The agreement that Kirchoff could have his homestead at the appraised value had been made before this time, though the way in which the matter should be settled up appears to have still been a matter of discussion; but my understanding is that it had been agreed that the homestead could be redeemed by Mr. Kirchoff or Mrs. Kirchoff at the appraised value. The appraisal was made in July or August, 1878.

(Witness identifies a letter from Daniel Sharp, vice-president of the company, to Robert B. Kendall, dated January 8, 1879, in answer to the one last above given, and read a part of it, as follows:)

"In the matter of the Kirchoff case, if a settlement can be made which shall include Mrs. Diversey's suit and complications of every name and nature and attending costs, by Mrs. Diversey retaining the forty acres the other side of the railroad track, as shown by you to the writer, with all needful quitclaim deeds from parties in inter-

523 est, so that our title will be unquestioned to the whole property which we shall hold, we will consent to let her keep the forty acres rather than prolong the case in court. If, however, she declines, we wish you to push the matter as before advised."

(Witness identifies a letter-press copy of a letter in his own handwriting, dated January 14, 1879, addressed to the Union Mutual Life Insurance Company, in answer to the letter of Daniel Sharp, above set forth. A portion of this letter was read as follows:)

"In regard to the settlement of the Kirchoff case, do I understand the vice-president to refer to the suit now pending in the Supreme Court, *Johnson v. Diversey*, when he speaks of Mrs. Diversey's suit? If so, I have to say that a settlement, such as suggested, cannot be made to cover that suit, although it would cover everything else. We cannot make Johnson a party to our settlement. That suit, however, does not affect the title to the Diversey farm, which was the separate property of Mrs. Diversey, but does affect the title to all the other property in the trust deed, which was Mr. Diversey's, the suit being against his administrator. There is a large amount of other property affected by that suit. Mrs. Kirchoff's share was one-fourth, I believe. If the suit is finally decided in favor of the plaintiff, the claim becomes a lien upon the whole estate."

(Witness identifies monthly report, dated June 30, 1879, and reads as follows:)

"June 9th, prepared quitclaim deed from Angela Diversey to the company of certain premises described. Prepared release deed from L. D. Boone to Angela Diversey of certain premises described. Prepared quitclaim deed from Julius Kirchoff and Elizabeth Kirchoff to the company of all other lands not released, described in trust deed No. 682. Both deeds of quitclaim made in satisfaction of indebtedness."

I find no reference in this report to any agreement testified to for the redemption of the Kirchoff homestead.

(Witness identifies a monthly report dated September 30, 1879, made by himself to the company. He says:)

"I find certain entries showing that on the 11th of September, 1879, I received from Angela Diversey deed of a portion of her land described in the trust deed held as security for the loan; that I delivered to Mrs. Diversey a release deed from Dr. Boone for a portion of her land covered by the trust deed; that I had received from Julius Kirchoff and wife a quitclaim deed for all the remainder of the lots in trust deed No. 682, and that on the 12th of September I had recorded the warranty deed of Angela Diversey to the company."

I see no reference in this report to the agreement to redeem the homestead.

(Witness identifies a letter-press copy of a letter to the company in his own handwriting, dated November 1, 1879. It is as follows:)

“Among the lot of deeds forwarded from this office today
524 for execution by the company is one to Kirchoff of his home-
stead lot, so called, which bears even date with the quitclaim
deed given by Kirchoff and wife to the company. There was an
understanding between Mr. Warfield, Kirchoff and myself that the
company would sell this lot back to him, and allow him to pay for
it in installments, but so far as I know the price was not definitely
fixed. The consideration named in the deed I have prepared is the
appraised value by Rees at the time he visited all the Kirchoff prop-
erty over a year ago. If the company approve of selling to him at
that price, please execute and return the deed and name terms of
payment. Kirchoff has expressed a preference for semi-annual
payments on principal, but has always objected to paying anything
down in cash; and I have always told him that the company
would not like to sell without a payment in cash on the delivery of
the deed, so that it is an open question as well as the price. He
has never been near me since he delivered the quitclaim deed, but
Mr. Warfield says that he claims now that he was to have the privi-
lege of buying back lot four also (Pine street), but such has not been
assented to by me in any way, for I have thought the redemption
of his house and lot was as much as he ought to undertake. In all
my conversations with Kirchoff I have avoided fixing the price, but
have told him what Rees' valuation was, and said I would advise
the company to reconvey at that price, and do so advise accordingly.
In the first instance, he said he would be willing, in order to make
a settlement and get rid of his obligations to the company, to under-
take the redemption of his homestead at even more than it was
worth. He now wants to include the lot on Pine street, making
the total consideration \$10,000 (so says E. A. W.). I don't think
we are under any obligations as to lot four, even morally, and, as I
understand it, we are under no obligations whatever as to his home-
stead, except to give him a chance to buy it back on such terms as
the company are offering other property—that is, long-time install-
ments and low rate of interest. I don't believe he will pay any
cash down, but think he will undertake to make a payment of one-
twentieth on the first of April next. I would suggest making him
such terms, with interest from date of deed, and then have him
either accept or decline, and end it.”

(On the margin is written :) “Lot four is in demand, and Kir-
choff knows there is money in it at the appraised value or at the
offer made by Isham some time ago (\$3,000).”

(Witness identifies a letter from John E. De Witt, president, to
him, in answer to the above, dated November 5, 1879. It is as fol-
lows:)

“Your favor of the 1st is at hand, and submitted to our finance
committee, yesterday, at their regular meeting. They declined to
sell the property mentioned to Mr. Kirchoff or anybody else for
\$7,000. They will at any time within the next thirty days sell it
to Mrs. Kirchoff on the following terms and conditions: For
525 \$8,400, one-quarter cash, balance to be paid in twenty equal
semi-annual payments, interest at 6 per cent. per annum.

The committee feel, in dealing with a man who has so little regard for his promise to pay, together with the fact that there is a fifteen months' equity of redemption in your State, they feel that they must have a considerable margin of the amount down. They would not sell to anybody without a payment down. They would not sell the other lot to Mr. or Mrs. Kirchoff, except for cash, and at a price to be named if they want it."

(Witness identifies a letter-press copy of a letter, in his own handwriting, in answer to the above, dated November 8, 1879. The letter is as follows:)

"I have the president's favor of the 5th, relative to the draft of deed sent by me to the company, on the 21st ult., for conveyance of Kirchoff homestead lot to Mrs. Kirchoff for \$7,000. I have communicated the company's decision to Kirchoff. Perhaps the finance committee did well to disregard my advice. I don't think Kirchoff will purchase, but perhaps he will."

(Original letter reads: "I will communicate the company's decision to Kirchoff." See Exhibit 40, *post*, Record, page 531.)

I do not recollect whether I ever communicated the decision of the company to Kirchoff or not, and do not recollect that he ever expressed himself as willing to accept the company's offer.

(Witness identifies one of his monthly reports, dated December 31, 1879, and reads a portion of it as follows:)

"November 8th, filed for record deed from Kirchoff and wife to company. Received a letter from company in relation to mine of 31st October, saying finance committee declined to sell Kirchoff his homestead for \$7,000, but will sell for \$8,400, one-quarter cash, balance twenty equal payments, six per cent. interest. November 17th, received letter from company, saying this matter must be fixed up before the end of the year. December 1st, sent company a quitclaim deed from Kirchoff and wife to company."

(Witness identifies the quitclaim deed from Kirchoffs to the company dated Sept. 4, 1879, which is an ordinary quitclaim deed, conveying, for one dollar and other valuable considerations, the premises in question and other property. It contains the following clause:)

"This conveyance is given and accepted in satisfaction of certain indebtedness of the said Julius Kirchoff and Elizabeth Kirchoff, secured by a trust deed on said premises, given by the said Julius Kirchoff and Elizabeth Kirchoff, his wife, and Angela Diversey, to Levi D. Boone, trustee, dated the 8th day of May, in the year 1871, and recorded in the recorder's office for the said county of Cook, in Book 649 of Deeds, page 131."

526 (The above deed is duly executed, acknowledged September 5, 1879, and recorded November 8, 1879, as appears by proper certificates.)

(Witness identifies a letter-press copy of a letter dated November 17, 1879, from him to the Union Mutual Life Insurance Company, in reply to De Witt's letter of November 14, 1879, and reads part referring to Kirchoff matter, as follows:)

"In reply to the president's third favor, of same date, relative to Kirchoff and Maher cases, I have to say that the deed from Kirchoff and wife to company has been recorded, and will be forwarded as soon as received from record. I expect to give this case all the additional 'fixing up' that it requires, and to be able to report the same as completed before the 1st of January."

I commenced proceedings to foreclose the Kirchoff trust deed on or about July 11, 1878, and conducted the proceedings for the company from that time forward until final sale under the decree.

It is my opinion, that at the time the Kirchoffs executed the quitclaim deed, the property covered by the trust deed was not worth the claim of the company. I don't think I considered at that time that it would sell for the amount of the debt, and the appraisal by Mr. Rees, in the summer of 1878, was considerably below the amount of the indebtedness. As attorney of the company, I could have taken a deficiency decree against the Kirchoffs for the difference between what the property sold for under the decree of the court and the claim under the trust deed. I think Warfield was appointed receiver about September 1, 1878, which was at least a year prior to the execution of the quitclaim deed. I understand that the Kirchoffs took a lease from Warfield, as receiver, of the homestead. I don't recollect that I ever saw it.

I don't recollect ever receiving any instruction from the company to eject Kirchoff on account of non-payment of rent.

(Witness identifies one of his monthly reports, dated May 28, 1880, and reads therefrom as follows:)

"On the 28th day of May I received a letter from Mr. Warfield, as receiver, saying he was unable to collect rents now due from premises occupied by Kirchoff and requesting that measures be taken to eject him. I shall make application to the court for assistance in this matter as soon as the national convention is over, the court having adjourned during the meantime."

(Witness identifies a letter from him to the company, dated November 2, 1880, and reads statement of sale of property under the Kirchoff trust deed, continuing as follows:)

"It seemed to be best to bid in these pieces of property for about enough to satisfy the decree and costs, partly because a deficiency decree would be worthless, and it was also understood between the parties to the suit, Kirchoff and wife and Mrs. Diversey, that
527 in consideration of their quitclaim deeds no deficiency decree should be taken, and partly because it might enable the company to sell the property before the master's deed will be issued in January, 1882. Holding, as you now do, the deed of Kirchoff and wife, and certificates of sale for probably, in most cases, much more than the market value of the property, so that a purchaser, being an assignee of the certificate for a sum less than its face, would have no fear of redemption by any creditor."

(Witness identifies a monthly report, dated January 3, 1881, in his own handwriting, and reads from it as follows:)

"Since our last report all the Kirchoff property has been sold

under foreclosure decree and bid in for the company, the particulars of which sale, etc., were duly reported by letter at the time, and the fifteen certificates of sale forwarded. Kirchoff himself still remains in possession of the lot on the corner of Rush and Pearson streets, and Mr. Gallery, who was appointed receiver in place of Mr. Warfield, has not been able to collect much rent from him, although he gets plenty of promises, and says he got one cigar the other day. We can of course make out a case of forcible detainer against Kirchoff and eject him at the end of a lawsuit, but the premises don't seem to be very valuable for rent to any one else, and we have been hoping Kirchoff would get his business going so as to pay up. It looks rather dubious, however, and if the company prefer, we will go for him."

I don't know whether the letters and reports read show correctly the proceedings had in relation to the Kirchoff foreclosure and settlement or not. What statements have been read from my reports are substantially correct so far as they show the transactions. I should say that the chances are that they would be more absolutely correct, so far as dates and events are concerned, than what I give from memory at this day. I didn't make the agreement myself and have not testified to having made it myself. What I know was chiefly derived from conversations with Warfield and Kirchoff, and the way the matter was treated in my presence as a settled thing, so far as the terms on which the redemption or repurchase was to be made. I, as attorney for the company at the time, never favored this project, because I had serious doubts about Kirchoff's ability to carry it out. I think Kirchoff had expressed to me at times his readiness to carry out the agreement. He never, to my knowledge, made a tender of any money.

Redirect examination of ROBERT KENDALL by Mr. HARBERT :

In the absence of express instructions, Mr. Warfield and myself acted under our general authority and instructions in carrying out what was understood to be the general policy and wishes of the company in regard to the transaction and settlement of their business in connection with the various loans in Chicago and 528 the real estate acquired by them. The general scope of Warfield's authority and work was the collection of interest and principal, negotiations of terms of settlement with delinquent borrowers, either by taking their property in satisfaction of their indebtedness or making terms upon which they could redeem or carry their loans, making the burden a little lighter when necessary, and generally to get all he could for the company. His business was also to sell and dispose of property under general and special instructions received from time to time, carrying out a general policy, as understood, on the part of the company to dispose of its real estate as fast as possible, without a greater sacrifice than necessary. It was generally understood that the company would sell real estate at its appraised value on easy terms and low rate of interest. Mr. Warfield acted under general instructions to that effect, which were

of course modified from time to time by special instructions in particular cases, but usually his sales were ratified by the finance committee as a matter of course. The company was willing to dispose of any of its property for one-tenth cash, balance in annual or semi-annual payments for five or ten years, at a low rate of interest. The company had on hand at the time of the Kirchoff transaction a large amount of property here, which was substantially all acquired by foreclosure of trust deed or surrender by the borrower.

It was my custom, when property was surrendered to the company, to insert in every deed a clause to the effect that it had been taken for the indebtedness. My reason for this custom was that I had some doubt, the company being a foreign corporation, whether it had a right to acquire property, except in satisfaction of an indebtedness; and I inserted that clause so that the deed itself should show it was not an out-and-out purchase. The clause in the Kirchoff quitclaim deed was substantially, and I think actually, the same as in all such deeds, and was put there for the benefit of the examiner of the title, and not necessarily as showing the consideration of the deed.

I first heard of the agreement for redemption about the date the foreclosure proceedings were commenced or at the time of the appraisal, from conversations had with Warfield and Kirchoff. At the time of the foreclosure Kirchoff furnished the carriage in which we visited the property. The agreement was the subject of general conversation, and I understood that the expedition was organized for the purpose of fixing a price at which Kirchoff could redeem this property from the mortgage.

(Witness reads some letters and makes statements explanatory thereto, showing in brief that up to the time of the entry of the judgment against Mrs. Diversey, negotiations had been going on for funding the entire debt in a new loan, with the same security, on ten years' time, semi-annual payments. Kirchoff, however, understood the proposition to be on ten years' time, none of the principal to be paid till the end. The company finally answered that
529 the easiest way to acquire title was to let Kirchoff have his way about it, but to try to get the time reduced to five years if possible. The matter finally fell through, because Mrs. Diversey refused to sign the papers and the entry of the judgment against Mrs. Diversey substantially ended all negotiations for making new papers for the entire loan.)

The appraisal was made about the last of August, 1878.

The negotiations for redeeming the homestead, I think, did not commence until after I filed the bill to foreclose in July, 1878. I do not think there had been any negotiations for nearly a year previous, and do not recollect whether Warfield and Kirchoff had any or not. I think Kirchoff made some overtures to Warfield immediately after the commencement of the foreclosure proceedings. I do not recollect any negotiations with Mrs. Diversey for about a year afterwards, but do not remember definitely when the negotiations with her commenced. They were entirely separate from the

Kirchoff negotiations, but I always thought it was necessary to settle with her in order to make a settlement with the Kirchoffs. The Diversey settlement was a matter of considerable difficulty. I understood there would be no difficulty in settling with Kirchoff. Kirchoff also made a proposition to redeem the farm, but that fell through, as he was unwilling to give as much as we thought necessary. That is the proposition to which reference is made in my report of November 25, 1878.

My letter of January 1, 1879, correctly states the facts at that time. I could not have taken title from Kirchoff except by foreclosure if I had not settled with Mrs. Diversey. I explained to Kirchoff at the time of continuing the foreclosure proceedings again, that it was necessary to do so to cut out the intervening title so that the company could make a good title to them and take a good mortgage back. No difficulty was anticipated in settling with Kirchoff; the Diversey settlement was the stumbling block.

Vice-President Sharp was here once at least during these negotiations, and, I think, was informed fully in regard to them. So far as the Diversey matter was concerned, he did not seem to want to agree to a settlement that involved any concessions on the part of the company, and I have no recollection with reference to his attitude to the Kirchoff settlement.

(Witness identifies a letter dated December 2, 1878, from the president to Vice-President Sharp, who was then in Chicago, and reads same, as follows:)

"Your two favors of the 27th at hand. Note your comments about Loeb; also about the Couch property.

"In Kendall's report, just received, he speaks about a proposition and an adjustment of the Kirchoff loan. Now, I would suggest, if you will allow me, that you get Kirchoff and Mrs. Diversey, 530 and the other son-in-law, into our office, or somewhere else, and have an interview with them, and see if you cannot get the loan straightened out. By your acting as an intermediate party, the thing can be accomplished; at least it is so large an interest, it is well worth the attempt."

I recollect Mr. Sharp being in Chicago at the date of this letter, and think I was instructed to confer with him. I recollect that I did explain the condition of things to him, my negotiations with Mrs. Diversey, and the defenses set up to the foreclosure suit. Mr. Sharp did not decide while here whether the company would agree to the proposed terms of settlement or not; but after his return to Boston I received the letter, already introduced, authorizing a settlement on certain terms.

I do not recollect that anything was said about the Kirchoff branch of the case. I knew that there would be no difficulty in settling with them, as they were willing to surrender all their property in settlement of the debt, only stipulating for a reconveyance of their homestead, which they seemed very desirous of retaining. If anything was said to Mr. Sharp, it was to the effect that there would be no difficulty in settling with them.

When I received the deeds from Mrs. Kirchoff and Mrs. Diversey I recorded the Diversey deed, but held the Kirchoff deed in my office until I should hear from the company in regard to the conveyance to be made to Kirchoff; the Kirchoff deed having been made, as he explained to me, with the understanding on his part that he was to have a deed from the company of his homestead and the adjoining lot on Pine street; I did not feel like receiving it unconditionally. I told Kirchoff that while I had no doubt that the company would make a deed to him of the lot or lots on the terms proposed, I did not wish to do anything finally in the matter without first having the formal authorization on the part of the company.

Referring to my letter of November 1, 1879, in which I say that, so far as I know, the price was not definitely fixed, and that "I have always told him that the company would not like to sell without a payment in cash on the delivery of the deed; so that it is an open question as well as the price," I would say that I presume I did not like to take the responsibility of fixing the price at which the Kirchoffs were to redeem or repurchase, as it was a little out of the line of my duties. I am very clear that I must have understood that Kirchoff and Warfield had agreed that the price should be the appraised value. I wrote that there was an understanding between Warfield, Kirchoff, and myself that the company would sell this lot back to him and allow him to pay for it in installments. As that was in pursuance of the general line of policy of the company in such case, I felt authorized in becoming a party to it, but did not care to put myself on record as fixing the price. Perhaps I desired to hedge a little, to avoid any possible misunderstanding or censure.

531 Kirchoff objected to paying any cash down, but wanted to pay at the end of six months. I discouraged him, but told him I would submit that proposition. I understood it as a modification of the agreement for his accommodation. He put it in the way of a request for such modification. Kirchoff seemed to be more anxious to hold on to the homestead than anything else. In the agreement for redemption the two lots were always considered together.

In my reply to the letter from the company declining to sell to Kirchoff, I stated that I had communicated the company's decision to Kirchoff, and when asked by counsel whether I did so communicate, I said I did not recollect; I have remembered since that I did inform him, but I do not remember just when or how. Kirchoff insisted upon his right to have his deed.

The Kirchoff quitclaim deed was recorded November 8, 1879, I suppose by me or under my direction.

After the receipt of the letter in which the company refuse to execute the Kirchoff deed, I remember several conversations with Warfield in which he took the ground that the agreement for the repurchase of the homestead had been agreed upon; that it had been clearly understood between him and the company, and that the president

was not acting in good faith in declining to convey at the price and in demanding a larger payment down.

I think it was after the deed from Kirchoffs was recorded that I discovered that it would be necessary to foreclose.

So far as I know, Kirchhoff claimed all along that he had a contract with the company in regard to the homestead. He was not particularly urgent or persistent, and did not come near me much. The only time I remember is when I amended the foreclosure bill, as before stated.

(Witness identifies letter from the president of the company to him, dated March 14, 1879. After calling attention to several loans, among which is the Kirchhoff loan, the letter continues as follows:)

"We wish vigorous measures to be taken in all the above cases that will permit it, and wish matters pushed to a speedy settlement. We have no desire to make such an exhibit of overdue interest on a few loans at the end of the present year, as we are compelled to at the beginning."

Recross-examination of Mr. KENDALL by E. R. SWETT:

My instructions were received from the president, sometimes orally and sometimes by correspondence. I never understood that I had any special authority to make trades any further than would naturally fall within the scope of the authority of an attorney transacting business for a client. I don't recollect receiving any instructions with relation to the agreement for the redemption of the homestead lot, except so far as contained in the letters introduced in evidence. It was my custom to make monthly reports covering, in a measure, the transactions made by me. In addition to this, I was in the habit of writing letters on matters of special importance. I think if I had ever made such an agreement as the one in regard to the homestead I should have reported it, but, as I before stated, I never made such an agreement, but understood that Warfield did. I was informed by Kirchhoff and by Warfield that the agreement was made by him on behalf of the company. I don't recollect that I was present when he made it, but have heard it referred to as an existing agreement.

I did participate in the matter so far as to tell Kirchhoff he could buy the property back upon terms to be agreed upon, but never undertook to agree definitely as to price or exact terms of payment; only gave him to understand that the company would sell it to him the same as they would to any one else. I don't recollect ever reporting to the company about that agreement until I sent the draft of a deed, nor to any officer of the company orally.

Briefly, the terms of the agreement were, that Kirchhoff was to have the privilege of redeeming that part of this property upon surrendering the rest. I always understood that the appraised value put upon it by Mr. Rees was to be the price at which he was to redeem it. That appraised value, as I recollect, was \$7,000 for the corner lot and \$2,500 for the Pine Street lot. The terms, as I under-

stood them from Mr. Warfield, were one-tenth cash and the balance spread over nine years, in annual or semi-annual installments.

One of the terms of the agreement, as I understood it, was the making of a cash payment. Kirchoff never came with the money to make a tender, but always talked as though he could make the necessary payment until the time came for drawing the deed, and then he wanted to postpone the payment. He did not refuse to make it, but wanted it deferred.

I think there was a definite agreement in regard to both lots. The deed which I sent to the company only covered one lot, because I thought that was all Kirchoff was able to undertake. I perhaps rather overruled Kirchoff in that matter. He assented to it rather reluctantly. He allowed me to draw up the deed and send it.

I received no instructions from the company to record the deed from Kirchoff and wife. I had told Kirchoff that I would take his deed and hold it until I heard from the company in regard to the conveyance back to him, and in the meantime would not put it on record nor take any advantage of him, intending to keep the matter open until he had settled definitely the terms of his contract with the company, if he had any.

After the company's refusal to execute the deed, I think I had an interview with him. I think I tendered his deed back, or
533 gave him the opportunity to withdraw it, but he concluded to deliver it, insisting that he had a contract. I know I never recorded it without an understanding, and think it was not recorded by mistake. I don't recollect everything in connection with the matter. I do recollect the interview and his insisting upon the agreement, and it is my best recollection that I told him that he could withdraw the deed if he wished to.

Subsequent to this time I proceeded to perfect the foreclosure of the trust deed, and neither Kirchoff nor wife made any defense. I think I was requested by Warfield to put Kirchoff out, on account of non-payment of rent, and intended having done so, but think I never did. I think I told him that the foreclosure proceedings would make no difference with his agreement, but would benefit the title, and that the company could not give a good title nor take a good mortgage back until the intervening claim was got rid of. This was subsequent to the time I received the letter from the company repudiating the bargain. Kirchoff let all the foreclosure proceedings go by default.

Direct examination of CHARLES KLEIN, a witness called on behalf of the complainant June 11, 1885:

My name is Charles Klein. My place of residence 211 West Van Buren street, and I am thirty-five years of age. My occupation is that of tailor's clerk. I know Julius Kirchoff, and was in his employ about 1878. He was doing business in 1878 at 122, 124, 126, 128 Clark street, Chicago, Illinois. He was running a saloon and beer-bottling business, and I was bartender and collector for him. I know E. A. Warfield and Robert B. Kendall. I was present at a

conversation which occurred about 1878, at which Mr. Warfield, Mr. Kendall and Mr. Kirchhoff were present. The conversation occurred in the basement of No. 126 Clark street. I was called in there to see one of the gentlemen in the back part of the office, and I overheard Mr. Warfield say: "I am glad to say the thing is settled, and you are satisfied and we are satisfied." Then they talked about the homestead, and Warfield said: "It is satisfactory to you and satisfactory to us, and I am glad the thing is settled, and you will retain your homestead at the valuation of what it is worth." I could not say whether anything was said at the conversation about deeds or not. In reply to what Mr. Warfield said, Mr. Kirchhoff said: "Well, gentlemen, let's go and take a drink on it; I am satisfied, and so are you satisfied."

Q. Was anything said, so far as you remember, about any reason given by Mr. Kirchhoff why he wished to retain the homestead?

A. He says: "If everything is lost, I have got a home for myself and wife, anyway. That belongs to us."

Kirchhoff's homestead was at that time on the corner of Rush and Pearson streets, Chicago.

534 Cross-examination of Mr. KLEIN by Mr. SWETT:

This conversation took place about seven years ago. I could not tell what month, but I know it was about that time. It was in 1878, either in August or September, I think. I probably saw Warfield and Kendall in the saloon dozens of times. I went in there to see the book-keeper in regard to the collections, and in this case I went and got the food and drinks that they ordered. I didn't talk with the gentlemen any. I had no business to. I just waited on them. They told me to bring a bottle of wine and I brought it, and they drank it. I was standing there and could not help hearing their conversation. I may have waited on others during the time; I suppose I did. It was my business to make myself useful around there and wait on people. I remember this conversation from the fact that it was a novel kind of a table that they had—a half beer barrel standing on the floor. They used that to put their glasses on. I was present at several other conversations between these gentlemen, but cannot state what was said, except that it was on business matters. They had frequent conversations about the property, and I knew that that was what they were talking about, and I understood from this conversation that Kirchhoff was to retain the homestead. I could not state what the agreement was, but they both expressed themselves as satisfied. I had not spoken to anybody about the conversation until the other day I accident-ly met Kirchhoff, and having heard about the suit, told him I remembered the conversation.

(The remainder of witness' testimony consists principally of repetitions of his statements, and develops nothing material.)

Testimony of Elizabeth Kirchoff, Taken before the Master January 30, 1886.

I am 47 years of age; live at 525 North Clark street, Chicago, and am complainant in this case. Julius Kirchoff is my husband, and I authorized him to do all my business with the company. I had borrowed some money from that company on the real estate. I told my husband to do the best he could for me; I wanted him to make the best arrangement he could, but to save the homestead for me in any event.

He told me that we had to sign over all what we had to the company, and that was the time when I told him to do the best he could to save the homestead for me, and then to pay \$1,000 as soon as the papers would come, and then, after that, to pay the \$1,000 until we paid \$10,000—every year a \$1,000 until we had it paid off.

We were to pay interest. This was before we signed the deed, because I would not have signed the deed if it had not been that I wished my husband to keep the homestead for me. The company gave as an excuse, that if he should sign over to them it would be better for us, but I think if he had kept it in our hands we 535 would have done better for ourselves. We could have made a great deal more money out of it, and we could have kept the homestead also. I would not have made the deed if I had not expected to get the homestead back.

By "the homestead" I mean the lot on the corner of Rush and Pearson streets, and the one on Pine street—now Tower place.

I remember of my husband, Mr. Warfield, Mr. Kendall and Mr. Rees coming to our house. When they came my husband told me it was on account of appraising the land to make out this deed to the company, according to the contracts we made with them. They appraised the two lots at \$10,000. I was always ready and willing to carry out my part of the agreement my husband made for me. My object in signing the deed for the company was so I could preserve the homestead.

Complainant rests.

Deposition of John E. De Witt on Behalf of Defendant, Taken, upon Written Interrogatories, at Portland, Maine, in May, 1885.

After the formal parts, said deposition is as follows:

My name is John E. De Witt; I am 45 years of age; am president of the Union Mutual Life Insurance Company, and reside at Portland, Maine. I am not acquainted with Elizabeth Kirchoff, but years ago I met Julius Kirchoff. I have been president since 1876, and I know of no relations which the Kirchoffs have sustained to the company, except as borrowers of money secured by a mortgage on real estate. The loan was made before my connection with the company. I find, by reference to the real-estate and mortgage book, that it was for \$60,000, made May 8, 1871, and that L. D. Boone was trustee. Also, that there was given, as collateral, the note of one Redeling for \$1,500, upon which we collected \$920.

An agreement was made between the company and the Kirchoffs for the purpose of settling the indebtedness, by which the company was to take all the property mortgaged, except a tract of a few acres, and cancel the debt.

Mr. Warfield took charge of the real-estate and mortgage loans at Chicago in the fall of 1876, under a written contract, a copy of which I understand is in the hands of our attorneys at Chicago. I think we dispensed with his services in the summer of 1880. When I was elected president, Kendall was in charge of the legal matters at the home office, and was transferred to Chicago to perform the same duties at about the same time that Warfield was sent there. His services were dispensed with in January, 1881. They neither of them had any authority to make trades, contracts or agreements for the company, but were instructed to report all propositions made to them relative to our real estate and real-estate loans to the home office, for the consideration and decision of the finance committee. It was their custom to follow their instructions in that regard; and after receiving the reports of Warfield and Kendall, it was the company's custom to instruct them in relation to the matters therein contained. They had no authority from the company to complete negotiations in regard to the settlement of mortgages or sale of real estate, without submitting such negotiations to the company.

I never instructed either Warfield or Kendall to make any arrangements for the redemption of the property involved in this suit, and Mr. Secomb ceased to be superintendent of loans August 1, 1878, which, I believe, antedates the claims of the plaintiff in this suit.

I should think that, from 1876 to 1881 I was in Chicago altogether fully a year. During these visits I think I saw Mr. Kirchhoff about three or four times, and talked with him about paying off the mortgage.

I have no recollection of ever having any conversation with the Kirchoffs with relation to redeeming the property, or of discussing the matter in the presence of the Kirchoffs, and of Kendall or Warfield, or of hearing the matter discussed in their presence by either Kendall or Warfield.

I had frequent conversations with Warfield and Kendall about the Kirchhoff indebtedness, but never in relation to an agreement entered into by them as agents for the company for the redemption of the property involved in this suit, until after Kendall had sent a deed from the company to Kirchhoff to be executed, which the company declined to do; and the first that I ever heard of such pretended agreement was when the company received said letter, dated November 1, 1879.

Neither Warfield nor Kendall had any authority to bind the company in any way, in connection with real estate or loans; they were only authorized to receive propositions and forward them to the company, for the consideration and decision of the finance committee; and, after such decision, to carry out the instructions they received from the company in regard thereto.

Cross-interrogatories:

E. A. Warfield held himself out, and was held out by the company, as its financial agent. I do not know how Kendall held himself out. We considered him our general legal adviser in Chicago.

(Upon request, witness here attached to his deposition three letter-heads used by Kendall and Warfield while in the employ of the company, which show "E. A. Warfield, financial agent," and "R. B. Kendall, attorney.")

Warfield succeeded Levi D. Boone as financial agent, but did not have the same authority. In addition to Warfield, Daniel Sharp, the vice-president, E. R. Secomb, for a time superintendent of loans, and myself, when we were in Chicago, gave special attention
537 to the financial affairs of the company. Mr. Sharp was vice-president and a director, and during the period the Kirchoff business was pending visited Chicago several times in relation to the company's business.

I was frequently in Chicago, and at such times was in the habit of conferring with Warfield with reference to the company's real-estate and mortgage loans, and gave him directions, but always subject to the subsequent approval of the finance committee.

I am familiar with the correspondence in the Kirchoff matter. My answers have been made from my own knowledge and belief, except so far as I have referred to the books and correspondence of the company for data.

Deposition of Edward R. Secomb, of West Newton, Massachusetts, taken on behalf of defendant at Portland, Maine, on oral interrogatories, before Fred. V. Chase, a notary public, on the 29th of September, 1886, and succeeding days, in accordance with the stipulation to said deposition annexed.

I live at West Newton, Massachusetts; am seventy years old and am not in active business. I was connected with the Union Mutual Life Insurance Company as superintendent of loans from 1876 to about 1881. While acting in that capacity I was in Chicago about every two or three months, and would stay sometimes two or three weeks or more at a time. I knew Edwin A. Warfield, then in the employ of the company. I did not know Elizabeth Kirchoff. I knew something about a loan to Elizabeth Kirchoff at the time, but have forgotten the particulars. I do not recollect that I gave Mr. Warfield any instructions in relation to said loan.

(Counsel here stipulate that objections to testimony on account of immateriality or irrelevancy are to be considered as made without being further stated.)

I had nothing special to do with the mortgage. The important matters were submitted to the home office by our attorney in the office at Chicago.

I had no authority to direct Warfield to make arrangements with parties against whom foreclosure proceedings had been commenced, for a compromise or waiver of foreclosure proceedings, except that

which I received in such cases from the home office; I have no recollection that I received any such instructions from the home office in the Kirchhoff loan; and no recollection of ever giving Warfield any such instructions.

I have no recollection of having any conversation with Mr. Warfield on the subject of the Kirchhoff redemption. I never did give him authority to make such agreement in relation to the company's business, unless I had authority from the home office. I was acquainted with Daniel Sharp, of Boston. He was vice-president of the company. He died about two years ago.

538 (It would appear that the following testimony was given on the cross-examination, though the fact of its being cross-examination is not noted:)

When I received instructions from the home office it was from the president, generally by correspondence. Before going to Chicago, I usually consulted with Mr. De Witt, the president of the company, in regard to the business to be attended to while there; and when during such consultations I received instructions with respect to business at Chicago, I endeavored to attend to it according to such instructions.

In interviews with Warfield, the financial agent, and with Kendall, the attorney, I only told them what to do, by the advice of the president. I don't remember that I ever received any instructions with regard to the business at Chicago from the finance committee.

I have been connected with the company, as a director, for twenty-five years or more. Attended to their real-estate business and loans in the West for three or four years. Mine was a sort of general supervision of the settlements that were made by the company, rather than having charge of the details. Dr. Boone was the financial agent of the company at Chicago a part of the time that I was superintendent. I don't remember who succeeded him, nor the date at which he ceased to have charge of the company's business, nor whether he resigned or was removed, nor when he transferred the company's business in his hands.

I think I remember that when Boone ceased to be financial agent at Chicago, Warfield was appointed agent; don't know whether financial agent or not; and I don't remember about the company issuing circulars stating that Dr. Boone had ceased to be its financial agent, and that Warfield was appointed in his place.

Dr. Boone's authority came from the president of the company before I was appointed. I don't know the extent of his authority, but think it was very general. It is my impression that Mr. Warfield was advertised as the financial agent of the company, and as successor to Dr. Boone, but I don't remember the details.

Don't remember what relations Mrs. Diversey had to the Kirchhoff loan. Don't remember how she was settled with. Don't remember whether the company ever released to her any property. Don't remember what the consideration was, nor the amount of the Kirchhoff loan. Don't remember to have heard of any mistake in the de-

scription of any property covered by the Kirchoff and Diversey loans. Don't remember of seeing any correspondence from Kendall, advising the company of the possible invalidity of Mrs. Kirchoff's paper, and don't remember of ever hearing of Kirchoff's bankruptcy. Don't know anything about any proposition with relation to funding the Kirchoff loan.

While I was in Chicago, Warfield and Kendall consulted with me with relation to pending matters, and advised me of their
539 situation. This whole matter has very largely gone out of my mind. Many of the facts have passed from my mind, but any directions I gave in the case were received from the home office.

My business while at Chicago was looking at the property and getting valuations. That was the principal thing I went out for, to see about property we had and about what it was worth. The company employed two appraisers for the special business of valuing the property, and we took their report. I made no personal appraisal. I do not remember when the first appraisal was made. I had but one made, though perhaps the company may have had others. While I was there in Chicago, I think there were various foreclosures and sales and settlements in which the company was interested, and about which I was consulted by Mr. Warfield and Mr. Kendall, but I can't bring my mind to recall the names of the more important matters now. My memory is not so good as it used to be and don't serve me in these matters. I know that they had directions from the home office; that the rule was that they should look to the home office for their directions.

I met Mr. De Witt in Chicago occasionally, and when he was there I have no doubt that we talked these matters over with Kendall and Warfield. There were several matters talked over, but I can't particularize them now. I think the Kirchoff and Diversey loans were talked over, but I had no counsel with them in these matters that I can remember. I am not willing to state that I did not have counsel with them respecting the Kirchoff and Diversey matters.

I occasionally met Mr. Sharp in Chicago, though not often. Mr. Sharp gave his attention to the Nebraska loans, but occasionally came to Chicago. I don't know that he took a more active part than myself with respect to the company's Chicago matters generally, but he had more authority than I had. I don't remember of De Witt's giving Warfield and myself any special directions as to what we should do concerning the company's business at times when he was in Chicago. I always advised with him as to what I was doing. Mr. De Witt was frequently at Chicago, and, when there, gave his attention to the business, and advised with Warfield and Kendall. I don't think Mr. De Witt very frequently left Mr. Sharp in charge of the business at Chicago in connection with Kendall and Warfield. I don't know about Sharp giving Warfield and Kendall directions.

I don't recollect the terms upon which the company offered to fund its loans in Chicago. In many cases it was the policy of the

company to get the old loans which Dr. Boone had placed funded by reducing the interest and having the principal payable one-tenth a year annually, but I don't know to what extent the plan was adopted. I do not remember the terms of sales to mortgagors on partial-payment system. I don't remember whether the
540 policy was adopted of releasing property to mortgagors at Rees' and Morey's valuation on ten years' time, though it may have been.

I don't remember what particular instructions with reference to the Kirchhoff business I received; and I don't remember of giving Warfield and Kendall any instructions on that subject. I could not swear that I did not, but I have no recollection of doing so. I know that there is at present a controversy between the company and Mrs. Kirchhoff, but I don't know what the nature of it is. I may have seen the property involved in this suit years ago, but have forgotten the circumstances.

I am not able, on account of not being sufficiently posted, to state whether or not it would have been considered any concession by the company to make a sale of the property in question at an appraised value upon ten years' time and upon deferred payments. Within the last few years it has always been the policy of the company to realize on its real estate, so as to get the same into interest-bearing securities. I never knew that it was its policy to speculate in real estate. We had to sell some for less than the appraised value, but before I answered whether a sale at the full value would be a concession or not, I should want the case explained to me more fully.

When I first went to Chicago Dr. Boone had charge of the company's business there. I think Mr. Kendall joined me soon after I got to Chicago. I think it was in 1874 or 1875. I think Dr. Boone was financial agent there for some months after I arrived. I did not stay in Chicago all the time after going there until Warfield took charge; I returned to Boston before that. I think Warfield had charge of loans and real estate only. I do not remember what advertisement or announcement was made of the change from Dr. Boone to Mr. Warfield. I cannot tell exactly how many loans the company had at Chicago without reference to my book. I should think they had as many as fifteen or eighteen hundred. I could not approximate the gross amount loaned at Chicago at that time with any accuracy. I know that our loans in the West at that time were at least four millions of dollars, and it is my impression that more than half of them were in Chicago. A large portion of the matter of details in the management of such loans was necessarily left with the financial agent. I do not remember whether or not I was advised while at Chicago of settlements that were made.

(Defendant produces W. B. Wirt as a witness and identifies by him certain files of the United States circuit court in the foreclosure suit of the Union Mutual Life Insurance Company against Elizabeth Kirchhoff, which papers were introduced in evidence, and it was

stipulated that the following stipulated statement of facts might be inserted in the record, in lieu of said files:)

First. That the defendant company filed a bill in the United States circuit court for the northern district of Illinois, upon 541 the 11th day of July, 1878, for the purpose of foreclosing the deed of trust from Julius Kirchoff, Elizabeth Kirchoff and Angela Diversey to Levi D. Boone, dated May 8, 1871, which said deed of trust was given to secure the joint judgment note of said three last-named parties. Said bill sought to foreclose said trust deed as to all the property therein mentioned (except that which had been previously released), including the property involved in this suit, namely, lots two (2) and four (4), in block twenty-one (21), in the Canal Trustees' subdivision of the south fractional quarter of section three (3), township thirty-nine (39), north, range fourteen, east of the third principal meridian. That the bill also sought to correct an error in the description of the property in the trust deed belonging to Mrs. Diversey.

Second. August 9, 1878, an alias chancery subpœna, returnable the first Monday in September, 1878, was issued to all the defendants, and service had upon the 10th day of August, as appears by the return of the marshal. It appears by said return that said Elizabeth Kirchoff was served by leaving a copy of the subpœna with her husband.

Third. That on the 20th day of November, 1878, Angela Diversey, one of the defendants in said last-named suit, filed her answer in said cause, in which she averred that the loan secured by said trust deed was not made to her, but that she became a party to the notes and trust deed solely as a surety for Julius Kirchoff; and she denied that there was any mistake in the description of the premises in the trust deed. She further averred that she was induced to execute said trust deed through the false representation of Julius Kirchoff that it was to secure \$5,000 only; that the company was aware of the said misrepresentation and of the fact that she was thereby led to execute the trust deed; and denies that the defendant company has a right to recover from her any greater sum.

Fourth. That on the 11th day of November, 1878, there was entered an order in said cause, reciting that said Julius Kirchoff, Elizabeth Kirchoff and other defendants, being severally called to appear and make answer to the bill, and that none of them appearing, default was taken against them and the bill taken as confessed.

Fifth. That on the 16th day of November, 1878, there was entered in said cause an order appointing Edwin A. Warfield receiver of certain of the property described in the trust deed, including the premises in question.

Sixth. That on or about the 6th day of September, 1880, the said Edwin A. Warfield, receiver, filed a written report in said cause, by which it appears that the said Julius Kirchoff paid him rent for the use and occupation of said premises.

It is further stipulated that thereafter the said Edwin A. 542 Warfield, receiver, resigned, and that James R. Page was appointed receiver in said cause.

Seventh. That on the 28th day of October, 1881, the said James R. Page, receiver, filed a petition representing that he had been appointed receiver in said cause; that Julius Kirchoff was in possession of said lots two (2) and four (4), of block twenty-one (21) aforesaid, and that he refused to surrender possession of the same to said receiver or to pay rent therefor. Said receiver prayed for a writ of assistance to eject said Julius Kirchoff from said premises.

Eighth. That on the 28th day of October, 1881, the court entered an order upon said Julius Kirchoff to show cause within five days why he should not surrender possession of said premises to said receiver.

Ninth. That on the 16th day of November, 1881, said Julius Kirchoff filed an answer to said rule, which answer is set out in the record immediately following the testimony of E. A. Warfield.

Tenth. That on the 16th day of November, 1881, the said court issued a writ of assistance directing the marshal to put said James R. Page, receiver, into possession of said premises.

Eleventh. That on the 17th day of January, 1880, the bill in said cause was amended making Eben F. Runyan, of the State of Nebraska, Robert E. Jenkins, assignee in bankruptcy of said Runyan, and George W. Stanford, parties defendant, and that on the 15th day of March, 1880, an order of default was taken against said last-named defendant and the case referred to Henry W. Bishop, master in chancery, to take proof.

Twelfth. That said master in chancery took testimony in said cause, and that on the 2d day of July, 1880, he filed his report in which he found that the allegations of the bill were true, and recommended a foreclosure of said deed of trust.

Thirteenth. That on the 30th of August, 1880, there was entered in said cause a decree confirming said master's report and ordering said master to make a sale of the entire premises covered by said deed of trust, except such parcels as had been theretofore released to Angela Diversey and others.

Fourteenth. That on the 29th day of October, 1880, the said master filed in said cause his report, that in pursuance of said decree he did, on the 20th day of October, 1880, make a sale of said premises, as directed in said decree; that the highest bid at said sale was by the complainant for the sum of \$92,000, and that there remained unsatisfied under said decree the sum of \$1,027.24; that said property was offered and struck off in separate parcels, the whole aggregating \$92,000, and that said lot two (2), above described, was bid in for \$9,000, and said lot four (4) for the sum of \$8,000.

513 Fifteenth. That on the 24th day of February, 1882, there was entered in said cause an order confirming said master's sale.

Sixteenth. That on the 21st day of January, 1882, the time of redemption having expired, the said master made deeds to said complainant of the various tracts of land embraced in said deed of trust, including the premises in question.

Seventeenth. That on the 21st day of January, 1882, there was entered in said cause an order approving said master's deeds.

EDWIN A. WARFIELD was called on behalf of defendant and testified as follows: I was receiver for a certain period in the foreclosure suit of The Union Mutual Life Insurance Company against Kirchoff, and recognize my report as such receiver.

Deposition of Charles L. Drummond, a witness of lawful age, taken at Portland, Maine, on the 29th of September, A. D. 1886, and succeeding days, in accordance with the stipulation hereto annexed.

Present, for the complainant, W. S. Harbert, and for the defendant, the Hon. Josiah H. Drummond.

(Counsel for complainant objects to the taking of the deposition in so far as said deposition seeks to introduce in evidence letters and other instruments in writing, because the copies of such instruments are not the best evidence, and because there is no sufficient evidence to charge the complainant with knowledge of their contents, nor evidence showing that such instruments so far as they are letters were written by or on behalf of the party purporting to subscribe them, nor that they were sent to or received by the party or parties to whom they purport to be addressed, and otherwise immaterial, irrelevant, incompetent and secondary.)

(Counsel for the respective parties stipulate that the above objection may apply to all questions and answers in this deposition.)

My name is Charles L. Drummond. My residence, Portland, Maine. Am forty-two years of age, and am employed as a clerk by the Union Mutual Life Insurance Company, in charge of the real-estate and mortgage department. I have custody of the correspondence, papers and documents relating to that department. I have examined the files, letter books, papers and documents for all correspondence, reports, papers and documents relating to the Kirchoff loan, and can produce them. The paper you now hand me is an agreement between Edwin A. Warfield and the Union Mutual Life Insurance Company.

(Counsel for the respective parties here stipulate that instead of the witness reading said instrument and having the magistrate copy it in full in the body of the deposition, that a copy may be annexed to the deposition, marked "Exhibit 1, F. V. C.," but shall have no further force as evidence than as though this stipulation had

544 not been made, and shall be subject to the same objections. This stipulation to relate to all questions and answers calling for or giving the contents of written instruments.)

The paper you now hand me is an agreement between Robert B. Kendall and the Union Mutual Life Insurance Company, a copy of which is introduced in evidence and marked "Exhibit 2, F. V. C."

The paper you now hand me is a power of attorney from the Union Mutual Life Insurance Company to Robert B. Kendall, a

copy of which is attached to the deposition and marked "Exhibit 3, F. V. C."

I find no other original agreement between the company and Mr. Warfield, but I find this paper (a copy) which I herewith annex, marked "Exhibit 4, F. V. C." I have not compared it with any original, and personally know nothing about it.

(Objected to as incompetent.)

I know of no other document purporting to be an agreement, either with Warfield or Kendall, in the company's files, or anywhere else. I have spent nearly two weeks in searching for papers connected with the Kirchoff loan, and have made strict search everywhere where they should be or would be likely to be.

To the best of my knowledge, J. H. Gallery was a clerk for Robert B. Kendall and Edwin A. Warfield.

I have examined the files and archives of the company for the correspondence and letters to the company which relate to the Kirchoff loan, and herewith produce them and annex copies hereto. In some cases portions of letters, etc., not relating to the Kirchoff loan are omitted, and the omission is indicated by stars. These exhibits are marked Exhibit 5 to Exhibit 109, inclusive, F. V. C.

I have in like manner examined for all documents and papers of every kind, letter-press copies of all letters going from the company from its home office to persons in Chicago, and relating to the Kirchoff loan, and I herewith produce them, and annex copies of the same to this deposition as exhibits marked 110 to 167, inclusive.

Cross-examination by W. S. HARBERT:

The company transacts its business under the following officers: President, secretary, assistant secretary, cashier and board of directors. The cashier may not be an officer. I have been connected with the real-estate and mortgage department most of the time since August, 1882. I have charge of the books relating to real estate and mortgages, and all correspondence connected with the same, and the custody of all the deeds and mortgages, and of all the papers relating to this department. My predecessor was John Wain. As being in charge of the real-estate and mortgage department, I have no discretion nor any power with respect to renewing paper.

545 The company has not now and never has had, to my own knowledge, any superintendent of loans or of real estate. I don't know in what body, under its constitution and by-laws, the management of its affairs is vested. Generally, so far as I know, orders with reference to the management of the affairs of the company emanate from the president. Personally I had nothing to do with the Kirchoff loan, and know nothing about it. I know of it only as I have learned from others and from the books and correspondence of the office. I will endeavor to furnish a statement to be attached to this deposition, marked as "Exhibit 168, F. V. C." showing the amount of money received by the company from what

is known as the Kirchoff homestead, either from Kirchoff or from any one else since the company had possession.

In my search for papers affecting the Kirchoff loan I have hunted for all letters written to or by the company, without regard to whom they were from or to. Every letter received by the company relating to the real-estate and mortgage department is docketed. Each loan has a number. Every letter received by or written by the company in regard to that loan is docketed under its number, giving the date, from whom and to whom, and the substance of the letter. I have no doubt that under the method which was in vogue at the time the Kirchoff loan was being foreclosed or settled but that all letters written by the officers of the company at Chicago to the president here were filed and docketed.

As I remember, E. A. Warfield was described on the letter-heads used at that time as "E. A. Warfield, financial agent." I will attach one of such letter-heads to this deposition as "Exhibit 169, F. V. C."

I have never seen a copy of a circular issued at the time Warfield was appointed financial agent, and of my own knowledge know nothing of such circular. I have no personal knowledge as to who was financial agent at the time referred to. The books and papers, so far as I know, disclose no other than E. A. Warfield.

I am a brother to the Mr. Drummond who appears as counsel for the defendant in taking this deposition.

Redirect examination by JOSIAH H. DRUMMOND:

All instructions and authority issued to my department in relation to making and receiving or extending loans, the discharge or foreclosure of mortgages and the renting of real estate, come from the finance committee, through the president.

Recross-examination by W. S. HARBERT, October 2, 1886:

The books in the company's office do not give the dates of the master's deed to the company in this case. I have searched the files of the company in the home office, and do not find this
546 master's deed. I have given the copies of the letter-heads—of the original letters—asked for in all cases where I could find them.

(The following are the exhibits attached to said deposition:)

EXHIBIT 1—*Contract between E. A. Warfield and the Union Mutual Life Insurance Company of Maine.*

This agreement, made this 21st day of February, A. D. 1878, by and between the Union Mutual Life Insurance Company of Maine, party of the first part, and Edwin A. Warfield, party of the second part, witnesseth:

That the said party of the first part hereby agree to employ the said party of the second part at the annual compensation of thirty-five hundred dollars, payable in semi-monthly installments on the

first and fifteenth of each and every month during the continuance of this agreement.

That the said party of the first part further agrees to pay the necessary traveling expenses actually incurred by the said party of the second part while actually engaged in the prosecution of the business of said party of the first part, away from his place of residence, which for the purposes of this contract is known as Chicago, Cook county, Illinois.

That the said party of the second part hereby agrees to enter the service of the said party of the first part and to devote his whole time and energies in advancing the interest of the said party of the first part in such manner as may be directed by the officers of said company.

It is further understood and agreed that if the said party of the second part has at any time held any relations to this company, as agent or subagent, or broker, or otherwise, that the acceptance of this appointment will be understood to be and shall be independent thereof, and as an abrogation and annulling of such relation in every respect, and said party of second part shall act as agent solely under this appointment and contract.

Either party hereto may terminate this agreement and the appointment hereunder, unless the same be sooner terminated by death of said party of second part, or by mutual consent, at any time during its continuance, by giving to the other party thirty days' notice in writing to that effect, and this contract to take effect April 1, 1878.

In witness whereof, the said party of the first part has hereunto, in duplicate, caused the same to be executed by its president and secretary, and the said party of second part has hereunto in duplicate set his hand and seal this 12th day of March, 1878.

(Signed)

JOHN E. DE WITT, *President.*

J. P. CARPENTER, *Secretary.*

E. A. WARFIELD. [L. S.]

Sealed and delivered in the presence of—
ALBERT G. MILTON.

547 EXHIBIT 2—*Contract between Robert B. Kendall and the Union Mutual Life Insurance Company of Maine.*

This agreement, made this 1st day of April, A. D. 1878, by and between the Union Mutual Life Insurance Company of Maine, party of the first part, and Robert B. Kendall, party of the second part, witnesseth:

That the said party of the first part hereby agrees to employ the said party of the second part at the annual compensation of twenty-five hundred dollars, payable in semi-monthly installments, on the first and fifteenth of each and every month during the continuance of this agreement.

That the said party of the first part further agrees to pay the necessary traveling expenses actually incurred by the said party of

the second part, while actually engaged in the prosecution of the business of said party of the first part, away from his place of residence, which for the purposes of this contract is known as Chicago, Illinois.

That the said party of the second part hereby agrees to enter the service of the said party of the first part, and to devote his whole time and energies in advancing the interest of the said party of the first part in such manner as may be directed by the officers of said company.

It is further understood and agreed, that if the said party of the second part has at any time held any relation to this company, as agent or subagent, or broker, or otherwise, that the acceptance of this appointment will be understood to be and shall be independent thereof, and as an abrogation and annulling of such relation in every respect, and said party of second part shall act as attorney and counselor at law solely under this appointment and contract.

Either party hereto may terminate this agreement and the appointment hereunder, unless the same be sooner terminated by death of said party of second part, or by mutual consent, at any time during its continuance, by giving to the other party thirty days' notice in writing to that effect.

In witness whereof, the said party of the first part has hereunto, in duplicate, caused the same to be executed by its president and secretary; and the said party of second part has hereunto, in duplicate, set his hand and seal, this 1st day of April, 1878.

(Signed)

JOHN E. DE WITT, *President.*

J. P. CARPENTER, *Secretary.*

ROBERT B. KENDALL.

Sealed and delivered in the presence of—
H. HOWARD BENEDICT.

EXHIBIT 3—*Power of Attorney from Company to Kendall.*

Know all men by these presents, that the Union Mutual Life Insurance Company, a corporation established by and under
548 the laws of the State of Maine, hereby constitute and appoint Robert B. Kendall, of Chicago, in the county of Cook, and State of Illinois, attorney-at-law, their true and lawful attorney for them, and in their name and stead, to sign, seal, acknowledge and deliver all such bonds as are required by the laws of the State of Illinois to be given by the said company as security for costs and expenses when the said company commences a suit at law in said State for the recovery of property or for the collection of any claim or demand arising under mortgages held by said company.

Hereby granting unto him, said attorney, full power and authority, in their name and behalf, to sign, seal, acknowledge and deliver any and all deeds which he may deem necessary or proper in the premises and otherwise to act in and concerning the premises as fully and effectually as they might do if personally present.

In witness whereof, the said Union Mutual Life Insurance Com-

pany hereunto set their hand and corporate seal this fourth day of August, in the year of our Lord one thousand eight hundred and seventy-seven, by its president, John E. De Witt, thereunto duly authorized.

(Signed)

UNION MUTUAL LIFE INS. CO.
JOHN E. DE WITT, *Pres't.* [L. s.]

Signed and sealed in presence of—

(Signed) H. D. SMITH.

Acknowledged by De Witt as president, before a justice of the peace.

Certificate of magistracy.

Endorsed across the face of the body of said power of attorney is the following: "Revoked and ret'd by Kendall in his letter of August 20, '77."

EXHIBIT 4—*Copy of Contract between Company and Warfield.*

Memorandum of an agreement made and entered into this 18th day of September, A. D. 1876, by and between Edwin A. Warfield, of Boston, in the Commonwealth of Massachusetts, of the first part, and the Union Mutual Life Insurance Company, a corporation created by the laws of the State of Maine, and having an office at Chicago, in the State of Illinois, of the second part.

The said party of the first part hereby agrees with the party of the second part to act as its agent at Chicago aforesaid, for the collection of moneys loaned by it in the State of Illinois aforesaid, and for the general management of the affairs of said company, in relation to its loans and the securities therefor, according to such written instructions as shall be from time to time given to him by said party of the second part, or its executive officer, and said party hereby agrees to pay said party of the first part in full for his services the sum of \$416.66 a month, payable monthly.

549 This agreement shall continue in full force until thirty days after notice by either party to the other to terminate the same, and no longer, and all existing contracts are hereby abrogated.

(Signed)

JOHN E. DE WITT, *President.*
E. A. WARFIELD.

Witness:

E. R. SECCOMB.

(In the record, the correspondence which follows appears in the manner it was originally arranged in Drummond's deposition; the correspondence from the agents at Chicago to the home office at Boston appearing first as Exhibits 5 to 109, inclusive, followed by the correspondence from the home office to the agents as Exhibits 110 to 167. In abstracting, we have arranged all the correspondence chronologically, without reference to whom it was from or to, so that each letter is immediately followed by the reply wherever the reply appears.)

EXHIBIT 5—*Letter, Kendall to Company, Dated March 3, 1877.*

Stating that he has no abstract in 682, Kirchoff, which involves several different titles. Witness has had an estimate of the cost of a Kirchoff abstract made, and the same would be about one thousand dollars, less twenty per cent.

EXHIBIT 110—*Letter, De Witt to Warfield.*

Says he sees no other way than to pay \$1,700, less twenty per cent. discount, for abstract of title in 682, Kirchoff, and other cases.

EXHIBIT 111—*Letter, De Witt to Kendall, March 16, 1877.*

In your letter of March 3, 1877, you state you have no abstract for foreclosure 682, Kirchoff. According to our docket, copied from yours, this was foreclosed May 26, 1876. If this is so, why foreclose a second time?

EXHIBIT 6—*Letter, Kendall to Company, March 19, 1877.*

In reply to president's letter of March 16th. Says that entry in docket was a mistake.

EXHIBIT 7—*Letter, Warfield to Company, April 3, 1877.*

Reports one hundred dollars collected from Kirchoff on account of interest on loan 682. Warfield had informed Kirchoff that he would have to pay about six hundred dollars per month if he wanted further time in which to sell the property. That would keep the interest from getting any larger. Kirchoff seemed to think he could pay that much, and started off by paying \$100 on account. Gave Kirchoff to understand that by paying \$600 per month the company would put off foreclosure proceedings for a time.

550 EXHIBIT 112—*Letter, De Witt to Warfield, April 5, 1877.*

Approving action in relation to 682, Kirchoff and Diversey, referred to in Warfield's letter of 3d inst.

EXHIBIT 8—*Letter, Warfield to Company, April 25, 1877.*

Enclosing fire-insurance policies.

EXHIBIT 9—*Letter, Warfield to Company, May 4, 1877.*

Enclosing fire-insurance policies.

EXHIBIT 10—*Letter, Warfield to Company, May 9, 1877.*

Thinks it rather doubtful about collecting \$600 per month on account of Kirchoff loan. Has not been able to collect anything since April 2d last, but has not lost sight of the matter.

EXHIBIT 113—*Letter, De Witt to Warfield, May 11, 1877.*

We are in receipt of your favor of the 9th, with appraisals. We propose, with the proviso that the finance committee approve at their next meeting, that we will wait thirty days in 682, Kirchoff; then, if agreement is not carried out, bring the matter to our attention.

EXHIBIT 11—*Letter, Warfield to Company, May 12, 1877.*

Kirchoff gave check today for \$200, check dated the 18th, and we cannot deposit it until that time, consequently it will not appear in daily statement.

EXHIBIT 114—*Telegram, De Witt to Warfield, July 5, 1877.*

Can't you arrange Kirchoff matter before you leave?

EXHIBIT 12—*Letter, Kendall to Company, July 5, 1877.*

Have made search for judgments against Kirchoff and wife and mother-in-law Diversey, and find total amount judgments *versus* Julius Kirchoff, \$11,015.80. Total amount judgments against Elizabeth Kirchoff, \$1,952.14. Of the last amount the records show that \$1,583 has been satisfied, but judgment docket does not show it. This would leave only \$369.14. No judgments against Mrs. Diversey. Title to most of the property was in Elizabeth Kirchoff. Total valuation of all the property by Morey, \$76,480, and of this amount the lots standing in the name of Julius Kirchoff make up the sum of \$10,000. If upon examination no more serious objection to making the new paper appears than the judgments against Mrs. Kirchoff, they need not stand in the way of making a new deal. They could probably satisfy the judgments, but even if the company had to take title subject to such small amounts it would be better than the present state of affairs.

Hope Kirchoff will get up the abstracts, and if punching up will make him do so, I will see him well punched. Will not be practical to make new papers to convey lots standing in the name of Kirchoff on account of the judgment, and probably he don't own them. It will not take long to have abstract made to the farm and it will not be very expensive.

EXHIBIT 13—*Letter from Kendall to Company, July 10, 1877.*

Have just had an interview with Kirchoff. Says they are hunting up old abstracts, and thinks most of them can be found. He is highly pleased with proposition made him, and says he will use every endeavor to bring matters to a settlement on proposed basis. Seems to be in earnest. I think we are safe in allowing him a reasonable time to get his abstract. Will endeavor to get the farm title as soon as possible, but don't want to alarm him by appearing anxious about that particular transaction. The only risk seems to be the death, meantime, of the old lady.

EXHIBIT 115—*Letter, De Witt to Kendall, August 3, 1877.*

At a meeting of the finance committee this morning, we considered the matter of the Kirchoff loan, and we propose to let him have his own way about it, but get the time reduced to five years, if you can. The reasons moving the finance committee in this matter are simply these: that they deem this the easiest and quickest way to get title to the property, and if we have to go into court to correct the defect in the title affecting the larger part of the loan, it would injure the credit of the Co. a great deal more than to allow this money to remain at five per cent. for so long a time, even if they pay the interest. Certainly, if they do not pay the interest, we will have perfected title in the easiest way possible.

EXHIBIT 116—*Letter, Vice-President Sharp to Warfield, August 8, 1877.*

Referring to yours of 23rd of July, in regard to loan 682 Kirchoff, the finance committee have voted to extend loan ten years at five per cent. interest. Kirchoff to pay five per cent. of principal with each semi-annual interest.

EXHIBIT 117—*Telegram, Sharp to Warfield, August 16, 1877.*

Make new loan to Kirchoff five per cent., as agreed in president's letter of 3d.

EXHIBIT 118—*Letter, E. R. Seccomb, Sup't, to Warfield, September 11, 1877.*

Yours of 6th received. 682, Kirchoff. We agree with you, as stated in that letter, that you had better enter a judgment at once, and proceed to sell the property.

552 EXHIBIT 14—*Letter from Kendall to Company, Sept. 18, 1877.*

We find so many diverse and adverse interests in the Kirchoff case that it has been impossible to so harmonize them as to effect the settlement upon the basis proposed by the president when here. Son-in-law Weckler did not advise mother-in-law Diversey to make herself liable a second time for her son-in-law Kirchoff; hence she has declined to do more than sign a ten-thousand-dollar note, secured by a trust deed on her farm. Warfield and myself did not think this sufficient inducement to release her from liability for over \$75,000 on note we now hold, upon which we could enter up a judgment any day which would be a valid lien upon the farm, whether her trust deed is or not. Mrs. Diversey acts under the advice of Weckler, and Kirchoff has no influence with her whatever.

We had an interview yesterday with Weckler, at which he said the \$10,000 on the farm and her release from any further liability was their ultimatum. But when I told him that in that case we would have to enter up judgment on our note, we thought he exhibited signs of weakening. He began to refer to a suggestion of

mine made some time ago for a \$15,000 loan on the farm. I think they would give it. I think they are anxious to get Mrs. Diversey released from her liability on the old note, and I suspected from his manner that he did not know until then that we held her judgment note. He told us of some other land she owned, which he said was unincumbered, lying near the farm. After having alluded to the matter of taking judgment we thought it would be best to clinch the matter by entering it up at once, and I accordingly entered up a judgment against Mrs. Diversey alone for the sum of \$75,696.89, principal and interest due, and also for fees and costs, and ordered an execution.

Kirchoff has been through bankruptcy since he gave us that note, but has not got his discharge. It was applied for a long time ago, and the register reported in favor of it; and as there was no opposition, it would seem that he can get it at any time. He is probably unwilling to settle the costs. At the time the note was signed Mrs. Kirchoff had no capacity to make a contract except as to her separate estate, on account of her coverture, and I do not think a judgment against her would hold. Married women were at that time, in this State, under common-law disabilities as to making contracts (except as I have mentioned). Her trust deed executed with her husband would probably be good, but her note, not being a contract relative to her separate estate, would not be worth a cent. I therefore thought it best to take judgment against the widow Diversey alone. Think it probable that the parties will come to time upon almost any reasonable basis. Infer so chiefly from Weckler's manner when I mentioned judgment to him yesterday. At any
 553 rate we have a pretty solid lien on the farm and upon any other real estate of Mrs. Diversey.

EXHIBIT 119—*Letter, De Witt to Kendall, September 22, 1877.*

Your favor of the 8th inst. *in re* Kirchoff received. We think you did well to get judgment in the matter. Will it be advisable to drive them hard, and will judgment hold good if they go into bankruptcy? Please look into bankruptcy law carefully to ascertain our interests. We would prefer that these things be nursed till I get out next month, if by the delay we would lose no security we now have. If delay will be dangerous, protect the interest by action.

EXHIBIT 120—*Letter, De Witt to Warfield, January 30, 1878.*

Is there not something wrong in valuation of loans (enumerates certain loans, including 682)?

EXHIBIT 15—*Letter, Warfield to Company, February 11, 1878.*

We find Kirchoff has no title to twelve lots in Knokke and Gardner's subdivision, which takes \$17,380 out of Morey's valuation and \$20,000 from Rees' valuation; otherwise the valuations are correct, except if made now the average reduction would be fifteen per cent. below valuations of 1876.

(The letter-heads to nearly all the correspondence from the Chicago office are each substantially as follows:)

"Union Mutual Life Ins. Co., No. 133 La Salle street, room 15.
John E. De Witt, president; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney."

(The signature of Warfield is "E. A. Warfield, financial agent." These headings and signatures are omitted in abstracting for the sake of brevity.)

EXHIBIT 121—*Letter, De Witt to Warfield, February 12, 1878.*

Not material.

EXHIBIT 122—*Letter, De Witt to Warfield, February 13, 1878.*

Yours of the 11th at hand, relative to Kirchoff. As we understand now, the company has no title to twelve lots, but they are covered by the judgment that has been entered on the note. Is this not so? Call my attention to the matter when I visit Chicago.

EXHIBIT 16—*Letter, Warfield to Company, February 19, 1878.*

In reply to president's favor of 13th inst., relative to 682 Kirchoff, would say that Kirchoff had no title to twelve lots referred to in my letter of 11th inst., consequently the judgment does not reach them.

554 EXHIBIT 123—*Letter, De Witt to Warfield, March 26, 1878.*

Incloses fire insurance policies.

EXHIBIT 124—*Letter, De Witt to Kendall, April 25, 1878.*

Don't push foreclosure proceedings in Kirchoff and Diversey cases until the time of their voluntary or involuntary bankruptcy has expired, so far as it refers to our judgment being a prior lien on their unincumbered property.

EXHIBIT 125—*Letter, De Witt to Warfield, August 6, 1878.*

You charge \$2.40 Diversey appraisal expenses. Please have appraisal papers forwarded to this office.

EXHIBIT 17—*Letter, Warfield to Company, August 9, 1878.*

Replying to president's favor of 6th inst. relative to Rees' appraisal, will say that all papers relative to the loan are in the hands of Mr. Kendall, to whom above letter has been referred. The \$2.40 referred to we paid Mr. K. for railway and carriage hire in taking Mr. Rees to the premises.

EXHIBIT 18—*Letter, Kendall to Company, August 9, 1878.*

I have Rees' valuation of lot of land owned by Mrs. Diversey upon which we have first lien under judgment and which land is not included in trust deed 682. Valuation is \$300 per acre; but neither he nor I can tell exactly how many acres. It was called 20 acres and $\frac{3}{100}$ on assessor's plat, but a strip two chains wide has been sold off. Should think must be fifteen acres at least.

There has been a new development in the Kirchoff and Diversey matter. I have been notified that an old suit which was brought by the administratrix of one Johnson against Mrs. Diversey's husband in 1861, and which has been pending in the courts ever since, has lately been decided in favor of complainant, against administratrix of Diversey's estate, and that the claim constitutes a lien on the Diversey estate prior to our trust deed. Decree is for nearly \$8,000.

Nearly all the property in Kirchoff and Diversey trust deed was inherited by Mrs. Kirchoff from her father, Michael Diversey, and was set off to her in a partition among the heirs. The farm was the separate property of Mrs. Diversey, and no part of the estate of her husband. The estate had not been settled when our loan was made, but was formally declared settled in 1873, by probate court. The decree declares the settlement fraudulent so far as complainant is concerned and reopens it. Defendant has appealed to the supreme court. The decision was rendered August 1st inst., and was on appeal from the superior to the appellate court, and confirms in substance the decision of the lower court. Our abstracts showed settlement of the estate, but did not show this suit. It looks as
555 though we are in a bad position. This of course precludes any settlement with Kirchoff and Diversey by deed from them unless we are willing to take subject to the suit, or rather the decree.

EXHIBIT 126—*Letter, De Witt to Kendall, August 14, 1878.*

Yours of 9th at hand. Have the land you speak of in Kirchoff and Diversey loan surveyed by surveyor and get exact amount covered by our mortgage. Make a careful examination in regard to Johnson case, and make a report. How much property beside that covered by our mortgage is covered by this judgment, and, if judgment holds good, is it not advisable for us to buy it and commence to sell other properties first to satisfy it, and in that way protect our interest. When Mr. Sharp goes out show him this letter and talk it over with him.

EXHIBIT 19—*Report from Kendall to Company, September 24, 1878.*

Filed replication to answer of Diversey.

EXHIBIT 127—*Letter, De Witt to Kendall, October 4, 1878.*

Calls his attention to 682 Kirchoff, and asks that certain things be attended to (immaterial).

EXHIBIT 128—*Letter, De Witt to Warfield, October 4, 1878.*

Asks for information No. 682 Kirchoff and other loans.

EXHIBIT 20—*Letter from Kendall to Company, October 4, 1878.*

In trust deed of Kirchoff and Diversey, dated May 8, 1871, loan 682, were included lots 4, 5, 6, 7, 8 and 9, conveyed to Kirchoff in April, 1870, by Dorothea Volkman, who, in December, 1876, filed a bill in chancery to enforce a vendor's lien for non-payment of purchase-money. Suit was pending at time of loan to Kirchoff, and company was chargeable with notice, and of course took security subject to result of suit. A decree of sale was made by the court in 1871, and the lots were sold by a master in chancery and purchased by Dorothea Volkman, and deeds were duly executed and recorded conveying same to her. Kirchoff *et ux.* afterwards executed deed to Volkman. It would seem, therefore, the company has no lien upon these lots. Mrs. Volkman has recently requested that a release be executed and delivered to her by Dr. Boone, the trustee in the trust deed. President De Witt, being now here and fully advised, has consented to its being done. Dr. Boone has executed release deed.

EXHIBIT 129—*Letter, J. P. Carpenter, Secretary, to Warfield, October 11, 1878.*

Encloses papers, among which are valuations 682, Kirchoff.

556 EXHIBIT 21—*Letter, Warfield to Company, October 21, 1878.*

Responding to president's favor of 4th instant * * * No. 682 * * * Properties have been valued and papers are in hands of Kendall. Other matters will receive attention.

EXHIBIT 22—*Report, Kendall to Company, October 24, 1878.*

Wrote home office October 4, about having released lots 4, 5, 6, 7, 8 and 9.

EXHIBIT 23—*Letter, Kendall to Company, October 26, 1878.*

Encloses valuation papers in 682, Kirchoff.

EXHIBIT 130—*Letter, De Witt to Warfield, November 4, 1878.*

Suggests an appraisal of Kirchoff loan. We have Rees' individual appraisal, but prefer to have joint opinion of all three, as in other cases.

EXHIBIT 131—*Letter, De Witt to Kendall, November 5, 1878.*

Asks that attention be given to having land surveyed, etc., in 682, Kirchoff.

EXHIBIT 25—*Letter, Kendall to Company, November 8, 1878.*

Says he has not had survey made of that part of Mrs. Diversey's land upon which company merely had judgment lien, as nothing could be done at present.

In regard to judgment of \$8,000 against administratrix of Diversey's estate, the defendants have appealed to the supreme court, and case is still pending. Meantime we have only to wait and let the parties fight it out and then fight the plaintiff (if she wins), when she tries to satisfy her decree out of our property, or compromise, as may then seem best.

EXHIBIT 132—*Letter, De Witt to Kendall, November 11, 1878.*

Kirchoff. All we want in this case is to know where we are.

EXHIBIT 133—*Letter, De Witt to Warfield, November 14, 1878.*

Have received all valuation papers except those relating to 682, Kirchoff. Please return same.

EXHIBIT 26—*Letter, Warfield to Company, November 22, 1878.*

I send by express today sworn valuation by Rees, Morey and myself on various pieces of property; also report of valuations on certain loans. The farm which is held in 682 Kirchoff is not valued, Rees' figures being \$20,000, which, I think, is too high. As to the report, valuation has been carefully made; but, in my opinion, some of the outside property is valued too high.

EXHIBIT 27—*Letter, Warfield to Company, November 30, 1878.*

Encloses valuation 682 Kirchoff, called for in president's letter of 14th inst.

557 EXHIBIT 134—*De Witt to Warfield, December 3, 1878.*

Valuation papers 682 Kirchoff, enclosed in your favor of 30th ult., came duly to hand today.

EXHIBIT 28—*Letter, Warfield to Company, December 14, 1878.*

Relates to tax deeds. One in Kirchoff matter, for which the company pays \$45.

EXHIBIT 29—*Letter, Kendall to Company, January 1, 1879.*

Replying to favor of vice-president 20th ult., in which president and himself wish me to associate Mr. Sleeper in certain loans, among which is 682 Kirchoff. Explains delay in Kirchoff case by reason of Mr. Barber, counsel for Diversey, running for Congress. Obligated, as matter of courtesy, to grant him a little extra time in which to file answer. Case is now at issue and will be referred to master without delay. If case develops great difficulties, will retain Sleeper. At present it seems unnecessary.

Had hopes of making amicable settlement and avoiding litigation, but have not got such terms from Diversey as to care to submit them to your consideration. Weckler says it is a question with her of saving something from the property she pledged for Kirchoff's debt, and if we are not willing to concede anything, she might as well fight.

Think an offer from us to let her keep forty acres of the farm would induce her to give deed for the rest, though she has not said so. Have had several interviews with Weckler, and he wants to divide the farm (130 acres) between us. You are sufficiently informed of the complications, so that I need not state them fully. I explained them fully to Mr. Sharp, and have written fully to company. Think we can maintain our case in court, but we may have long siege of it.

Kirchoff would willingly surrender all his property and make an arrangement to buy back his homestead at a liberal price, but I do not dare to settle with him without settling the whole case, as it might prejudice our claim against Diversey. It is unfortunate that Boone released part of security without adequate consideration, thus leaving more than fair proportion to be satisfied out of remainder, and we cannot safely take Kirchoff's property for part of the debt and then hold Mrs. Diversey for balance. It would give cause for complaint on her part, and our idea of relative value of parcels of land might not be sustained by court.

Receiver has been appointed, and rents will be collected by him. Kirchoff has taken lease of his own house from the receiver. I wrote in my report for November about this case, and the matter was referred to vice-president then here. He did not appear to favor settlement involving any concessions on our part, but did not say so decidedly. Of course any settlement would involve some concession on both sides. If it is not thought advisable to negotiate I will give no further thought to the subject, but will push the court proceedings as fast as may be, but I would like a hint of your views in the matter.

EXHIBIT 30—*Letter, Warfield to Company, January 2, 1879.*

President's favor of 20th ult. to Rees, Morey and myself at hand, and desire to say in regard to 682 Kirchoff valuation, that description to farm property, 135 acres, was omitted in copying report; consequently value of that portion was not given. Rees and Morey are firm in their opinion that it is worth \$20,000. I cannot consistently say over \$13,500 or \$100 per acre. Rees originally valued Kirchoff property at \$83,000. This valuation embraced six lots in Knokke and Gardner's subdivision, which is omitted from last valuation. These lots were valued at \$10,000. The farm was then put at \$25,000. The Kirchoff property, except the farm, is placed now at \$39,100. Rees and Morey increase this by \$20,000, making total valuation \$59,100. My valuation places the farm at \$13,500, which would make total \$52,600. There has been some property

released from this loan since it was made which would reduce somewhat the original valuation of 1871.

EXHIBIT 135—*Letter, Sharp to Kendall, January 9, 1879.*

"Your favor of 1st in reply to ours of Dec. 20 received. In the matter of the Kirchoff case, if a settlement can be made, which shall include Mrs. Diversey's suit and complications of every name and nature, and total costs, by Mrs. Diversey retaining forty acres the other side of the railroad track, as shown by you to the writer, with all needful quitclaim deeds from parties in interest, so that our title will be unquestioned to the whole property which we shall then hold, we will consent to let her keep forty acres, rather than prolong the case in court. If, however, she declines, we wish you to push the matter, as before advised."

EXHIBIT 31—*Letter, Kendall to Company, January 14, 1879.*

I have vice-president's favor of 8th inst., and in reply would inquire in regard to settlement of Kirchoff case, whether vice-president refers to suit now pending in Supreme Court, *Johnson v. Diversey*, when he refers to Mrs. Diversey's suit? If so, such settlement as suggested cannot be made to cover that case, although it would cover everything else. We cannot make *Johnson* a party to our settlement. This suit, however, does not affect title to Diversey farm, which was her separate property, but does affect title to all other lands in trust deed which was the property of Mr. Diversey, the suit being against his administrator. There is a large amount of other property affected by that suit. Mrs. Kirchoff's share was one-fourth, I believe. If suit is finally decided in favor of plaintiff, the claim becomes a lien on the whole estate.

559 EXHIBIT 32—*Kendall to Company, Letter January 14, 1879.*

Relates to settlement of the \$1,500 note against one Redelings, which the company took as collateral in the Kirchoff loan. Recites defenses to the note, and advises settlement for \$500.

EXHIBIT 136—*Letter, Sharp to Kendall, January 18, 1879.*

"Your favor of the 14th received. We notice what you say relative to the Kirchoff cases and the suit now pending in the supreme court of your State—*Johnson v. Diversey*. If a settlement can be made, we wish it to include everything except this suit. It seems to us that even a better settlement than you have suggested could be made. Will you please talk the matter over with Mr. Warfield, and see if you can agree with him on a plan of settlement? We should also like you to confer with him on a compromise and settlement of the \$1,500 note to which you refer. We shall undoubtedly be satisfied with a plan which will have your united endorsement."

EXHIBIT 33—Letter, Kendall to Company, January 23, 1879.

Have today settled with Mr. Redelings, and have canceled and surrendered note. He paid me \$920, out of which I have had to pay \$6 for abstract. Have paid same over to Warfield, to be credited on the Kirchoff loan. I think the settlement very good.

EXHIBIT 34—Report, Kendall to Company, January 25, 1879.

Merely mentions the letters with reference to Kirchoff case and Redelings' settlement.

EXHIBIT 35—Report, Kendall to Company, January 31, 1879.

(This report should bear date January 31, 1880. It again appears as Exhibit 52, *post.*)

EXHIBIT 137—Letter, De Witt to Kendall, March 14, 1879.

"Desire to call your attention to the following loans, the overdue interest on which is now very large and daily increasing." (Enumerates certain loans, among which is 628 Kirchoff.) "We wish vigorous measures to be taken in all the above cases that will permit of it and wish matters pushed to a speedy settlement. We have no desire to make such an exhibit of overdue interest on a few loans at the end of the present year as we are compelled to at the beginning."

EXHIBIT 36—Report, Kendall to Company, March 15, 1879.

Saw Mr. Beattie, attorney for Charles Saleman, who secured judgment against Kirchoff—execution, dated October 18, 1876. He says the judgment has been satisfied.

EXHIBIT 138—Letter, De Witt to Warfield, May 1, 1879.

Immaterial.

560 EXHIBIT 139—Letter, De Witt to Kendall, May 27, 1879.

We call your attention to the following matters, with the hope of finding in your next monthly report a goodly number straightened out in a satisfactory manner. * * * 682 Kirchoff. Tax deed. \$2,200 to come.

EXHIBIT 37—Letter, Kendall to Company, August 7, 1879.

Sends list of parties against whom judgments had been taken. Among these parties is: Mrs. Diversey, \$75,704.39. Don't think individual responsibility of any of the foregoing parties is worth ten cents.

EXHIBIT 140—Letter, De Witt to Warfield, October 16, 1879.

Kindly inform us when we may expect to get Kirchoff loan, 682, in shape for closing it up. We would like this matter wound up at as early a date as possible.

EXHIBIT 38—*Letter, Kendall to Company, October 22, 1879.*

Enclosing warranty deed, Mrs. Diversey to company, loan 682, Kirchhoff.

EXHIBIT 24—*Report, Kendall to Company, October 31, 1878.*

October 22, sent to company warranty deed, Diversey to company.

(The date of above report evidently should have been October 31, 1879. See Exhibit 38.)

EXHIBIT 141—*Letter, De Witt to Warfield, November 1, 1879.*

In the Kirchhoff matter, we would request that a settlement be effected as soon as possible. Dr. Boone, we suppose, is at home now, and will give his attention to the part required of him. Have you possession of the house? We do not wish the above matters to lay over January 1st next, and for that reason urge your attention to the same.

EXHIBIT 39—*Letter, Kendall to Company, November 1, 1879.*

"Among a lot of deeds forwarded from this office today for execution by the company is one to Kirchhoff of his homestead lot, so called, which bears even date with the quitclaim deed given by Kirchhoff and wife to the company.

There was an understanding between Mr. Warfield, Kirchhoff and myself that the company would sell this lot back to him and allow him to pay for it in installments, but, so far as I know, the price was not definitely fixed. The consideration named in the deed I have prepared is the appraised value by Rees at the time we visited all the Kirchhoff property over a year ago. If the company approves of selling to him at that price, please execute and return deed and name terms of payment.

Kirchhoff has expressed a preference for semi-annual payment, account principal; but has always objected to paying anything
561 down in cash, and I have always told him that the company would not like to sell without a payment in cash on delivery of deed. So that is an open question, as well as the price. He has never been near me since he delivered the quitclaim deed, but Mr. Warfield says he claims now that he was to have the privilege of buying back lot 4 also (Pine St.), but such has not been assented to by me in any way, for I have thought the redemption of his house and lot was as much as he ought to undertake.

In all my conversations with Kirchhoff I have avoided fixing the price, but have told him what Rees' valuation was, and said I would advise the company to reconvey at that price, and I do so advise accordingly.

In the first instance he said he would be willing (in order to make a settlement and get rid of his obligation to the company) to under-

take the redemption of his homestead at even more than it was worth.

He now wants to include the lot on Pine street, making total consideration \$10,000. (So says E. A. W.) I don't think we are under any obligation as to lot 4, even morally; and as I understand it, we are under no obligation whatever as to his homestead, except to give him a chance to buy it back on such terms as the company were offering other property, i. e., long time, installment, low rate of interest.

I don't believe he will pay any cash down, but think he would undertake to make a payment of 1-20 on the 1st of April next.

I would suggest making him such terms, with interest from date of deed, and then have him either accept or decline, and end it." * * * "Lot 4 is in demand, and Kirchoff knows there is money in it at the appraised value or at the offer made by Isham some time ago—\$3,000."

EXHIBIT 142—*Letter, De Witt to Kendall, November 3, 1879.*

Your favor of 1st inst., with a number of deeds for execution, received, among which we find one covering lot 2, block 21, Canal Trustees' subdivision, being a part of security to No. 682 Kirchoff. We notice in this case you make mention of a special letter, which letter we do not find, and would ask by what authority this lot is sold for \$7,000, and why the proposition comes through you by special letter instead of through Mr. Warfield. Had the communication you referred to come to hand with the deed we might have presented it to our finance committee tomorrow, but as it is we do not understand the matter.

EXHIBIT 144—*Letter, De Witt to Kendall, November 5, 1879.*

"Your favor of the 1st is at hand and submitted to our finance committee yesterday at their regular meeting. They declined to sell the property mentioned to Mr. Kirchoff or anybody else for \$7,000. They will at any time within the next thirty days sell it to Mrs. Kirchoff on the following terms and conditions: For 562 \$8,400, one-quarter cash, balance to be paid in twenty equal semi-annual payments, interest at six per cent. per annum.

"The committee feel, in dealing with a man who has so little regard for his promise to pay, together with the fact that there is a fifteen months' equity of redemption in your State, they feel that they must have a considerable margin of the amount down. They would not sell to anybody without a payment down. They would not sell the other lot to Mr. or Mrs. Kirchoff except for cash, and at a price to be named, if they want it."

EXHIBIT 143—*Letter, De Witt to Warfield, November 5, 1879.*

"We have today written Mr. Kendall that the Kirchoff offer was declined, and we will not sell for less than \$8,400. We want you to take possession of the house, and as soon as the matter is closed up please advise us."

EXHIBIT 40—*Letter, Kendall to Company, November 8, 1878.*

"I have the president's favor of the 5th relative to draft of deed sent by me to the company, on the 31st ult., for conveyance of Kirchhoff's homestead lot to Mrs. Kirchhoff for \$7,000.

"I will communicate the company's decision to Kirchhoff.

"Perhaps the finance committee did well to disregard my advice. I don't think Kirchhoff will purchase, but perhaps he will."

EXHIBIT 145—*Letter, De Witt to Kendall, November 14, 1879.*

"We should like a full report upon the present condition of 682 Kirchhoff. This is a case that must be fixed up before the end of the year, and we urge upon you the necessity of pushing the matter to a close."

EXHIBIT 41—*Letter, Warfield to Company, November 26, 1879.*

Have waited sometime in order to be able to report settlement of number 682 Kirchhoff, but cannot do so yet. I saw him a few days ago, and we went to Kendall's office, but found Kendall absent. He agreed to meet me at Kendall's office the same afternoon at 4 o'clock, but I have not been able to see him since. He claims he settled with Kendall with the understanding that he was to purchase the homestead on terms submitted some time since by Mr. Kendall, and Mr. Kendall says that such is not the case. I have possession of the house under a lease to Kirchhoff, but he don't pay rent worth a cent.

EXHIBIT 42—*Letter, Kendall to Company, December 1, 1879.*

Enclosing quitclaim deed No. 682, from Julius and Elizabeth Kirchhoff to company.

EXHIBIT 147—*Letter, De Witt to Warfield, December 3, 1879.*

Your favor of 26th at hand in reference to loan 682, Kirchhoff. If he does not pay his rent, you have the usual remedy at hand to put him out, and there is no reason why you should not.

563 EXHIBIT 148—*Letter, De Witt to Warfield, December 5, 1879.*

Requests that charges in Kirchhoff matter be separated, so that each item may be placed against the piece of property to which it belongs.

EXHIBIT 146—*Telegram, De Witt to Warfield, December 5, 1879.*

Send valuation of Kirchhoff property, if any increase since last valuation.

EXHIBIT 43—*Letter, Warfield to Company, December 6, 1879.*

In regard to valuations asked for 682, Kirchhoff will not stand more than \$55,500. The homestead might stand an advance of

\$1,000, but I should take that amount from value placed on lot 4. I think the valuation October 7th last is all the property can stand.

EXHIBIT 44—*Letter, Warfield to Company, December 8, 1879.*

In reply to president's letter of 5th inst. Not important.

EXHIBIT 45—*Letter, Warfield to Company, December 9, 1879.*

In reply to that portion of president's favor of 6th inst., asking for separate valuation on Kirchoff property, have to say that I consider relative value to be the same, that is \$1,875 per acre.

EXHIBIT 46—*Letter, Kendall to Company, December 12, 1879.*

Have forwarded by express opinion of supreme court in Johnson case. Decision affirms decree of lower court and was in favor of Johnson. Interest and cost are added to amount found due, which make amount of claim now over \$8,000. Unless decree is paid proceedings will be commenced in probate court to sell real estate to satisfy it. The company represents entire interest of one of the four heirs, and if we settle we shall have to pay one-fourth of the claim. Attorneys of Johnson would like to know whether company will make settlement without putting them to trouble of further proceedings. Please advise me, and if we are to make amicable settlement, will see if I can get any discount. Don't see any way of avoiding settlement some time, and it would not be advisable to incur additional expense. The liability seems to be well settled.

EXHIBIT 46—*Letter, Warfield to Company, December 13, 1879.*

Referring to that portion of the president's favor of the 4th inst. relative to 682. Kirchoff, will say that the company has a deed to the property, but I understand that foreclosure proceedings are still pending. I am informed by Mr. Kendall that I can apply whatever moneys are in my hands in this case on account of taxes paid by the company, which I will do at once. I will close receiver's account with this property as soon as I can do so.

EXHIBIT 149—*Letter, Sharp to Warfield, December 17, 1879.*

Refers to vouchers.

564 EXHIBIT 150—*Letter, Sharp to Kendall, December 23, 1879.*

Your favor of the 12th, with copy of opinion in Kirchoff, 682, is at hand and contents noted. The opinion is today returned by express. Please lay it before the president for his examination.

EXHIBIT 47—*Letter, Warfield to Company, December 23, 1879.*

As appears in our daily statement, receiver has paid company for two tax items on Kirchoff property, amounting, with costs, to \$230.50. Please send vouchers.

EXHIBIT 151—*Letter, Sharp to Warfield, December 26, 1879.*

Refers to tax vouchers.

EXHIBIT 48—*Report, Kendall to Company, December 31, 1879.*

States that on November 8th he filed for record deed from Kirchhoff and wife to company. Received a letter from company in reply to mine of October 31st saying the finance committee declined to sell Kirchhoff his homestead for \$7,000, but will sell for \$8,400, one-fourth cash, balance in twenty equal payments at six per cent. interest.

November 17th, received letter from company saying this matter must be fixed up before the end of the year. December 1st, sent to company quitclaim deed from Kirchhoff and wife to company.

December 12th, sent to home office copy of opinion of supreme court in Johnson case.

Received reply from Vice-President Sharp asking me to lay matter of Johnson case before DeWitt when in Chicago, which I did, but no definite conclusion was reached as to the course to be pursued. Have since made further and more complete investigation, and on January 10th wrote asking instructions, to which have received reply that vice-president would be in Chicago in a week or ten days, and that I should refer matter to him.

EXHIBIT 49—*Letter, Warfield to Company, January 5, 1880.*

Contains a detailed list of vouchers for continuation of abstracts and payment of taxes in the Kirchhoff loan.

EXHIBIT 152—*Letter to Warfield, January 8, 1880.*

Sends for tax vouchers in Kirchhoff loan.

EXHIBIT 50—*Letter, Kendall to Company, January 10, 1880.*

Reports, with reference to Johnson case, that Johnson's attorneys have been pressing him for final decision as to what course company will take. Have put them off from time to time in order to make more investigation. Amount of decree is \$7,612 and interest, which to date amounts to \$8,639.62. If we pay \$2,151, they propose to release all the property in which company is interested from further liability.

565 In this case, the supreme court has found that at time administratrix closed her account, she held 1,160 shares capital stock of the Lill Chicago Brewing Company, par value \$100, which were amply sufficient to pay and satisfy this decree, and that she kept and retained in her possession over \$15,000 of personal assets, which the court found she has since held, and that all other debts of Diversey have been paid. Records show that she had \$2,411 in cash and 1,280 shares of said stock, but that she has distributed the money and stock among the four heirs and herself. Question

now arises whether the company, representing in its ownership of land one of these heirs, can object to a distribution of the funds, or whether they are estopped, having constructively received the benefit of such distribution. Unless some such estoppel exists, it would seem that the company would have a right to insist that the land cannot be held for this claim, but the remedy of the complainant is against the administratrix and sureties, on account of waste committed by her. I dislike to submit to the payment of any part of this claim without making vigorous resistance, and think there is an even chance at least of defeating them. Please consider and advise.

EXHIBIT 153—*Letter, De Witt to Kendall, January 13, 1880.*

Your favor of 10th inst., relative to 682. Kirchoff, at hand. Vice-President Sharp will be in your city in the course of a week or ten days and you will please refer the matter to him.

EXHIBIT 51—*Letter, Warfield to Company, January 13, 1880.*

Refers to vouchers, tax matters, etc.

EXHIBIT 154—*Letter, De Witt to Warfield, January 16, 1880.*

Yours of 13th at hand in relation to items against property 682, Kirchoff. Refers to manner of reporting disbursements.

EXHIBIT 52—*Report, Kendall to Company, January 31, 1880.*

Johnson claim presented to probate court and allowed by consent of Mrs. Diversey as a claim against estate of Michael Diversey. No proceedings have yet been commenced to subject company's real estate to its payment. Will try to make it exceedingly difficult for them if they undertake it.

EXHIBIT 155—*Letter, De Witt to Warfield, February 5, 1880.*

We have been looking over your receivership and rent account for January, and wish to call your attention particularly to the following * * * 682 Kirchoff, \$317.25 due.

In the case of number 682, you have been instructed to turn Kirchoff out unless rent was paid up, and we are at a loss to know why you give no heed to our wishes in this matter. Please explain.

566 EXHIBIT 53—*Letter, Warfield to Company, February 7, 1880.*

In reply to president's favor 6th inst., relative to rents due and unpaid * * * No. 682, Kirchoff * * * would say this matter had been placed in an attorney's hands for collection, but I hardly think he will succeed. We shall probably have to get an order from the court to put him out.

EXHIBIT 54—*Report, Kendall to Company, February 25, 1880.*

On February 3d, referred matter of Johnson claim to Vice-President Sharp, as directed by president. Decided not to settle any part of it until it is made certain there is no escape from it. They have done nothing further as yet. Johnson's attorney has left collection of claim with Mrs. Diversey herself, and, if she makes a move, we think we will be able to interpose successful defense.

EXHIBIT 55—*February 28, 1880, Letter, Kendall to Company.*
Enumerates numerous tax deeds enclosed in the letter.

EXHIBIT 156—*Letter, De Witt to Warfield, March 2, 1880.*
Refers to certain disbursements. Immaterial.

EXHIBIT 56—*Letter, Kendall to Company, March 4, 1880.*
Encloses deed from Hamilton (tax titles).

EXHIBIT 57—*Letter, Warfield to Company, March 5, 1880.*
Unimportant.

EXHIBIT 157—*Letter, De Witt to Warfield, March 8, 1880.*
Refers to vouchers.

EXHIBIT 58—*Letter, Warfield to Company, March 11, 1880.*
Refers to fire insurance policies and other unimportant matters.

EXHIBIT 59—*Letter, Kendall to Company, March 18, 1880.*
Encloses deeds from Hamilton (tax titles).

EXHIBIT 158—*Letter, Sharp to Kendall, March 20, 1880.*
Refers to tax matters.

EXHIBIT 60—*Report, Kendall to Company, March 31, 1880.*

March 15, proof of service of order on Runyan and on person in possession, and default and decree *pro confesso* as to Runyan, Stanford and Jenkins, and reference to master. March 25, notice of hearing before master for 26th, at which time defendants did not appear. Obligated to wait for Boone's return as a witness. Found it necessary in this case to get decree of court, in order to cut off the rights of certain parties under a sheriff's deed covering homestead lot; and also concluded that it would be better, as my petition prays for the correction of certain errors of description of the farm, to have a decree entered correcting the same; otherwise the record of the court would show that part was abandoned.

Our quitclaim deeds from Mrs. Diversey contain the proper descriptions ; but, as the proceeding had gone so far in court, it seems better to have correction made by decree. Dr. Boone was suddenly called away, and we will have to postpone the hearing until his return.

EXHIBIT 61—*Letter, Kendall to Company, April 10, 1880.*

Encloses quitclaim deed (tax title) from Daniel Sharp to company, 682, Kirchoff.

EXHIBIT 62—*Letter, Kendall to Company, April 14, 1880.*

Mrs. Diversey wishes to settle tax claim on the part of the farm released to her out of trust deed, 682, Kirchoff. Please forward certificates and receipts.

EXHIBIT 159—*Letter, Sharp to Warfield, April 20, 1880.*

Refers to disbursement.

EXHIBIT 63—*Letter, Warfield to Company, April 23, 1880.*

Encloses fire-insurance policies.

EXHIBIT 64—*Letter, Warfield to Company, April 24, 1880.*

Refers to a voucher—unimportant.

EXHIBIT 65—*Report, Kendall to Company, April 30, 1880.*

Relates to tax certificates on part of farm released to Mrs. Diversey.

EXHIBIT 160—*Letter, De Witt to Warfield, May 7, 1880.*

We notice that the uncollected rent on the Kirchoff property is on the increase, and would ask why steps have not been taken to have the tenant removed? The matter has been brought to your attention more than once, and we desire that some action be taken at once to get a new party to take the house from whom rent can be collected.

EXHIBIT 66—*Letter, Kendall to Company, May 8, 1880.*

Encloses quitclaim deed, Hamilton to Sharp (tax title), 682, Kirchoff.

EXHIBIT 67—*Letter, Warfield to Company, May 28, 1880.*

Replying to president's favor 7th inst., relative to 682, Kirchoff, will report that at about the time president was here last I gave matter to Wheeler, and he succeeded in getting \$100 out of Kirchoff. Since then the Best Brewing Company have closed up Kirchoff's business, and he is out of funds and likely to remain so. I have written Messrs. Kendall and Bliss to get an order from the court to either pay the rent or vacate the premises.

568 EXHIBIT 68—*Report, Kendall to Company, May 31, 1880.*

May 28th, received letter from Warfield, as receiver, saying he was unable to collect amount now due from premises occupied by Kirchhoff, and requesting that measures be taken to eject him. Shall make application to court for assistance as soon as national convention is over, court having adjourned during the meantime.

EXHIBIT 161—*Letter, De Witt to Warfield, June 1, 1880.*

Yours of the 28th, relative to Kirchhoff, at hand. We think the only proper way for you to do is to take possession of the property that Kirchhoff is now occupying.

EXHIBIT 69—*Letter, Warfield to Company, June 7, 1880.*

Referring to matter of rent due from Kirchhoff for house on Rush street, have to say he has today paid me \$80, and promised to pay \$60 per month, commencing the 20th inst., until the account is squared. Have not much faith in his promise, and had it been earlier in the season would not have accepted the money; but under the circumstances thought best to get the \$80, and if the \$60 is not forthcoming on the 20th, will immediately proceed to take possession.

EXHIBIT 70—*Letter, Warfield to Company, June 7, 1880.*

Please send description of ninety acres contained in deed from Mrs. Diversey, which grew out of settlement with her, in connection with Kirchhoff matter. This deed was sent to home office by Kendall October 22, 1879.

EXHIBIT 162—*Letter, De Witt to Warfield, June 9, 1880.*

Refers to description of Diversey property.

EXHIBIT 71—*Report, Kendall to Company, June 30, 1880.*

Testimony of Dr. Boone in regard to misdescription in trust deed, showing what property was intended to have been described, has been taken before master and report made up. Report finds the description incorrect by clerical mistake, and also what the correct description is; on strength of report, we shall get decree reforming description in trust deed, so there can be no question hereafter as to its correctness.

EXHIBIT 72—*Letter, Kendall to Company, July 10, 1880.*

Refers to tax certificates. Not important.

EXHIBIT 73—*Letter, Warfield to Company, July 12, 1880.*

President's favor of 9th inst., relative to 682, Kirchhoff, at hand. Have instructed Kendall to proceed in this case and get Kirchhoff out. As soon as he does I will rent the premises to somebody who will pay more promptly.

569 EXHIBIT 74—*Letter, Warfield to Company, July 24, 1880.*

Answer to president's favor June 9, 1880, concerning tax matters; unimportant.

EXHIBIT 75—*Letter, Warfield to Company, August 5, 1880.*

Refers to taxes.

EXHIBIT 76—*Letter, Warfield to Company, August 5, 1880.*

Refers to taxes.

EXHIBIT 77—*J. H. Gallery to Company, September 24, 1880.*

Tax matters. Not important.

EXHIBIT 78—*Letter, Kendall to Company, October 22, 1880.*

Tax matters. Unimportant.

EXHIBIT 163—*Letter, De Witt to Kendall, October 19, 1880.*

Asks for a report on the title to lot 26, block 28, Rose's subdivision, included in Kirchoff 632.

EXHIBIT 79—*Letter, H. C. Morey to Company, October 26, 1880.*

Reports offer of \$5,000 for No. 155 Fulton street, which is included in Kirchoff loan.

EXHIBIT 80—*Letter, Kendall to Company, October 27, 1880.*

States that many years previous an old distillery building, standing on the premises in question, had been seized by the Government on account of violations of the internal-revenue law, and sold by a master in chancery and bought in by the Government for \$2,500. The fire destroyed all the records of the county, so that the sale was not shown on the abstracts of title and has slumbered all these years. Claim takes in part of lots 1, 2, 3 and 4, as you will see by enclosed plat. The owner of lot 1 is anxious to buy the west thirty feet of lot 2, and says he will give \$100 a foot for lot 4. Think the title could be bought for a small amount.

Letter encloses plat referred to, also marked Exhibit 80.

EXHIBIT 81—*Letter, Kendall to Company, October 30, 1880.*

States that draft has been given to Henry W. Bishop, master in chancery, for \$977 costs, commissions, etc., in case against Kirchoff. Will forward certificates of sale with statement on Monday. Bids amounted to \$92,000, and I settled with master's commission on basis of \$50,000, one and one-half per cent., \$750.

EXHIBIT 82—*Letter, Kendall to Company, November 2, 1880.*

Encloses statement of sale under decree of foreclosure in Kirchoff case, by which it appears that lot 2 was bid in for \$9,000, and lot 4 for \$8,000.

570	Amount of decree.....	\$91,358 16
	Interest, cost, master's commissions, recording, advertising, and report bring the amount up to	93,027 24
	Amount bid at sale.....	92,000 00
	Deficiency... ..	\$1,027 24

Letter also encloses fifteen master's certificates of sale, the holders of which will be entitled to deeds January 21, 1882. "It seemed best to bid in these pieces of property for about enough to satisfy the decree and costs, partly because a deficiency decree would be worthless, and it was also understood between the parties to the suit, Kirchoff and wife and Mrs. Diversey, that in consideration of their quit-claim deeds no deficiency decree should be taken, partly because it might enable the company to sell the property before the master's deed will be issued in January, 1882. Holding, as you now do, the deed of Kirchoff and wife, and certificates of sale for, probably in most cases, much more than the market value of the property, so that a purchaser, being an assignee of the certificate for a sum much less than its face, would have no fear of redemption by any creditor. It seems now that the property might be all put into the market. This policy, in regard to the bids, has, of course, added a few hundred dollars to the expense of foreclosure, perhaps two hundred dollars, but on such a large amount of property that will not weigh against the advantage to be derived from holding it at high figures. The master agreed to base his commission on \$50,000, and allow me to bid as high as desired."

The claim presented about a year ago growing out of the old suit of Johnson against Diversey has recently revived enough to threaten proceedings to subject the land to its payment. "They have engaged fresh legal talent and have interviewed your humble servant two or three times and request a decision. We have taken time to consider. They seem to wait very patiently. We keep them waiting—pleasantly. Your counsel flatters himself that he is good at that—his 'stronghold,' as it were, and he has no doubt you will cheerfully accord him much credit in that line."

EXHIBIT 164—*Letter, De Witt to Kendall, November 2, 1880.*

Can you inform us at what figures we can settle the Government claim against 682, Kirchoff?

EXHIBIT 165—*Letter, De Witt to Kendall, November 4, 1880.*

Acknowledges receipt of Kendall's favor of the 2d inst., enclosing master's certificates of property. We approve everything from the beginning of your letter to the period after your name.

EXHIBIT 83—*Telegram, Morey to Company, November 8, 1880.*

Thinks he can sell Fulton street for more than \$5,000 soon.

571 EXHIBIT 84—*Letter, Morey to Company, November 8, 1880.*

Thinks he can sell 155 Fulton street for manufacturing purpose, for \$5,500 or \$6,000.

EXHIBIT 85—*Letter, Kendall to Company, November 10, 1880.*

In reply to favor of 2d, relative to Government claim in Kirchoff, inquiring for what amount the Government would sell, would say that I think it could be settled for \$2,000, or perhaps less; but as the records are all in Washington, cannot investigate the matter thoroughly without going there.

Exhibits 86 to 109, inclusive, contain nothing of importance to this controversy.

EXHIBIT 166—*Letter, De Witt to Kendall, November 11, 1880.*

Your draft for master's commission and costs in Kirchoff case has been paid. Kindly forward receipted bill for \$907.77.

EXHIBIT 167—*Letter, De Witt to Kendall, November 15, 1880.*

Acknowledges receipt of Kendall's letter of the 13th, enclosing receipted bill for costs for master's commissions, 682 Kirchoff.

EXHIBIT 93—*Letter, Morey to Company, December 15, 1880.*

Refers to sale of 155 Fulton street for \$5,500, and also reports offer of \$6,000 by Mr. Prentice for corner Rush and Pearson (Kirchoff homestead lot). Thinks it will bring more.

EXHIBIT 168.

Gives a detailed statement of the account of lot 2, block 21, Canal Trustees' subdivision, the same being one of the lots in question, to October 1, 1886, attached as an exhibit, purporting to be in pursuance of the request of counsel for complainant, on the cross-examination of Mr. Drummond, for a statement of amounts of income received from premises. The same is very long, and, as it seems to be immaterial to the present issue, we only make reference to the exhibit.

EXHIBIT 169.

Shows the following letter-heads :

"Union Mutual Life Ins. Co., No. 133 La Salle street, room 15.

John E. De Witt, president ; J. P. Carpenter, secretary ; E. A. Warfield, financial agent ; R. B. Kendall, attorney.

CHICAGO, ILL., —, 187—."

572 "Union Mutual Life Ins. Co., No. 133 La Salle street.

John E. De Witt, president ; Daniel Sharp, vice-president ; J. P. Carpenter, secretary ; E. A. Warfield, financial agent ; R. B. Kendall, attorney."

Stipulation as to taking testimony.

Notice for taking of deposition.

Dedimus for same.

The defendant introduced in evidence a contract between the Union Mutual Life Insurance Company and E. A. Warfield, dated February 21, 1878. Said contract is the same as "Exhibit 1," set out on page 477 of the Record. Defendant also introduced in evidence a contract between the Union Mutual Life Insurance Company and Robert B. Kendall, dated April 1, 1878, which said contract is the same as "Exhibit 2" set forth on page 480 of the Record. Defendant also introduced in evidence a letter from Robert B. Kendall to the company, dated March 21, 1879, in which he states, in reply to De Witt's letter of March 14, 1879, that Mrs. Diversey will settle on the terms proposed to the company by him and assented to, viz., to let her keep forty acres of the farm and quitclaim rest. Kirchoff and wife to quitclaim all their property, an old trust deed to be released, and everything made satisfactory.

Defendant introduced quitclaim deed from Mrs. Kirchoff and husband to the company, which deed was introduced before the master and is set forth in full on page 291 of Record.

Defendant read in evidence the quitclaim deed sent by Kendall to the company on November 1, 1879, for execution. Said instrument is an ordinary quitclaim deed from the Union Mutual Life Insurance Company to Elizabeth Kirchoff, conveying, for a consideration of \$7,000, lot two (2), in block twenty-one (21), of the Canal Trustees' subdivision of the south fractional quarter of section three (3), township thirty-nine (39), north, range fourteen (14), east, being one of the lots in question. Said instrument is unexecuted.

Defendant then read in evidence warranty deed from Mrs. Diversey to defendant company, dated July 1, 1879, acknowledged September 5th, 1879, and recorded September 12, 1879, in and by which Angela Diversey, widow, conveys to the Union Mutual Life Insurance Company, for the consideration of one dollar (\$1) the north fifteen acres of the northeast quarter of the southeast quarter, and the east half of the northeast quarter of section twenty-eight

573 (28), township forty-two (42), north, range thirteen (13), east situated in the county of Cook, and State of Illinois; subject to taxes and assessments and to the trust deed from Julius Kirchoff, Elizabeth Kirchoff and said Angela Diversey to the Union Mutual Life Insurance Company. Said deed contains the following clause: "This conveyance is given and accepted in satisfaction of certain indebtedness of the said Angela Diversey, secured by a trust deed of said premises, given by Julius Kirchoff and Elizabeth Kirchoff, his wife, and the said Angela Diversey to Levi D. Boone, trustee, dated the eighth day of May, in the year 1871, and recorded in the recorder's office for the said county of Cook, in Book 649 of Deeds, page 131."

Defendant also introduced in evidence a release deed from Levi D. Boone to Angela Diversey, dated June 9, 1879, recorded September 12, 1879, in and by which Levi D. Boone, in consideration of one dollar (\$1), releases to said Angela Diversey all right, title and interest derived by the above-mentioned trust deed to the following premises: The northwest quarter of the southeast quarter of section twenty-eight (28), township forty-two (42), north, range thirteen (13), east, in Cook county, Illinois.

It is stipulated that the Rees appraisalment of the homestead lot was \$7,500, and of the Tower Place lot \$2,500.

Complainant recalls JULIUS KIRCHOFF as a witness; being examined, he testifies as follows:

We used the \$60,000 which was borrowed from the insurance company in the business at 81 Michigan avenue, which belonged to myself, my three brothers and Mr. Kinney. We put the money right in the bank, to the credit of the firm, the same day. My wife never saw a cent of it, nor did I.

Cross-examination:

I was a member of the firm; my wife was not. The name of the firm was Julius Kirchoff, Brothers & Co. It was composed of Julius, Gustav, Frederick and August Kirchoff and John Kinney. My wife was not in the company.

Redirect examination:

I can't remember whether they ever tendered the quitclaim deed which we had executed to the company, back to me or not. There was some talk, but I said I would stick to my contract to give them a quitclaim and take the homestead. I don't know whether he offered the deed back or not; if he did, I told him I wanted my deed from the company. It was on that consideration only that we gave the quitclaim. I had a talk with Mr. De Witt myself. I cannot remember whether he offered the deed back to me. I remember there was some talk about it, but I said it was settled. I never saw the deed again.

Appeal bond.

574 It is also stipulated that Exhibits 33, 51, 55, 59, 80, 164, and 85, F. V. C., to the deposition of Charles L. Drummond, hereinbefore referred to, are as follows, to wit:

(EXHIBIT 33.)

CHICAGO, ILL., January 23rd, 1879.

Union Mutual Life Insurance Company, Boston, Mass.:

I have today settled with Mr. Redelings the matter of his note for \$1,500, held by the comp'y as collateral to the Kirchhoff loan No. 682, and have cancelled and surrendered the note.

He paid me nine hundred and twenty dollars (\$920); out of which I have to pay six dollars (\$6) to Handy & Co. for abstract, or, rather, duplicate, of part of the abst., which had been lost by Kirchhoff or some one else. I have p'd over the am't to Warfield, to be credited on the Kirchhoff loan. This is a better settlement than my previous letter lead you to expect, & Mr. Warfield & myself think it a very good one.

Resp'y, &c.,
(Signed)

ROB'T B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Co., No. 133 La Salle street, rooms 19, 20, 21.

John E. De Witt, president; Daniel Sharp, vice-president; J. P. Carpenter, secretary; E. A. Warfield, financial agent;
575 R. B. Kendall, attorney.

(EXHIBIT 51.)

CHICAGO, ILL., January 13th, 1880.

Union Mut. Life Ins. Co., Boston:

In reply to a letter written by Mr. Nickerson, but without signature, relative to items charged to the Kirchhoff property, have to say:

Tax deed (Carbine) \$1,000 is on lot 10, B. 64, original town.

Tax deed (Haas) \$153.40 and tax deed (city) \$151.31 cover lots 2 and 4, block 21, C. T. subd'n, in sec. 3, 39, 14.

Tax deed \$45 & \$225, costs, covers lot 12, block 4, Knokke and others' subd'n. The Gage matter of \$2,200 covers all the property, and we have no means of knowing how it should be divided accurately. The vouchers for \$110.42 and \$114.45, 1878 taxes, were sent the company Oct. 30th last.

Vouchers for all other items referred to were given Mr. Kendall long ago for use as evidence in the foreclosure suit. The credit of \$920 may be applied wherever it will do the most good, as it was the proceeds of a note which the company held as collateral and which was collected by Mr. Kendall. We credited it acc't advances

just the same as though Kirchoff had brought in the money to be applied on acc't.

Yours truly,
(Signed)

E. A. WARFIELD, *Fin'l Ag't.*
G.

576

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

(EXHIBIT 55.)

CHICAGO, ILL., *February 28th*, 1880.

Union Mutual Life Insurance Company, Boston, Mass.:

Herewith find tax deeds as follows:

No. 682, Kirchoff. John Forsythe to Dan'l Sharp, lots one & 2, bl'k 4, Knocke — Gardner's subd'n; recorded June 5, '79.

No. 682. Daniel Sharp to U. M. L. Ins. Co., same premises as above, not executed; to be executed and returned for record.

682 & 1113, McGovern. Hamilton to Warfield, E. $3\frac{1}{16}$ acres of block 3 and all of block 12, Lill & heirs of Diversey's div'n, S. W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ 29, 40, 14; also lots 1, 2, 3, 10, and 11, bl'k 4, Knocke & Gardner's subd'n, &c.; also lot 3, in bl'k 53, Kinzie's add'n to Chic., said lots being included in trust deed of Kirchoff & *al.*, \$682.00; also in same deed lot 8, of sublots 1 to 5 of lots 7 & 8, bl'k 2, & sublot 6, of lots 7 & 8, in bl'k 2, school sec. add'n, being part of the premises described in trust deed of McGovern, No. 1113, never recorded.

577 This deed has been canceled and deeds given by Hamilton to the Co. direct in place thereof, viz: A deed of the Kirchoff lots was executed in July last, but was not filed for record till 23rd inst. * * *

* * * * *

No. 682. City of Chicago to D. G. Hamilton, dated Aug. 1, '79, and recorded Aug. 25, '79, lots 2 & 4, in W. part of block 21. C. T. sub'n of S. frac'l $\frac{1}{4}$ sec. 3, 39, 14; have prepared deed from Hamilton to the Co., which he is to execute, and it will be sent to company as soon as recorded. Hamilton made a deed of this to Mr. Warfield last August, but as it has not been recorded I thought best now to cancel it & let Mr. Hamilton make one direct to the company in place of it.

No. 682. Deed from A. Gage to Hamilton, dated July 8, '78, recorded July 10, '78, lot 3, block 53, Kinzie's add'n, &c.; also lots 3, 10, & 11, in bl'k 4, Knocke & Gardner's subd'n, &c.

(A deed from Hamilton to company was executed in July last, and was filed for record 2, 23, '80, conveying same premises, and will be forwarded as soon as received from recorder's office.)

No. 682. Deed from H. H. Gage to Hamilton, dated July 6, '78, recorded July 10, '78, conveying bl'ks 3 & 12, in Lill & heirs of Diversey's div'n, and lots 1 & 2, bl'k 4, Knocke & Gardner's sub'n.

(A deed from Hamilton to the Co. has been executed, conveying the east $3\frac{1}{2}$ acres of said bl'k 3 and all of block 12, being all the Co. owns in Lill & Diversey div'n, and lots 1 & 2, in Knocke & Gardner's sub'n, and will be forwarded as soon as recorded.)

No. 682. County Clerk Klokke to E. R. Haase, dated M'ch 12, '78; recorded Mar. 14, '78; lots 2 & 4, in W. part bl'k 21, &c.

No. 682. Haase to Warfield, Mar. 12, '78; recorded Mar. 14, '78; same premises.

(Page 2, Exhibit 55.)

A deed of same premises was prepared some months ago & delivered to Mr. Warfield for his execution, but it appears upon enquiry that it has not been done.

It will be executed at once and recorded & then sent to the company.

No. 682. Deed from Thos. Carbine to Warfield, Nov. 17, '76; recorded November 18, '76; lot 10, bl'k 64, original town.

Warfield's deed last above mentioned will also convey to the Co. said lot 10.

No. 682. Deed from Hamilton to Sharp, dated June 4, 1879; unrecorded; lot 12, in bl'k 4, in Knocke & others' sub'd'n, &c.

The deed herewith enclosed to be executed by Mr. Sharp will convey this lot to the company, together with lots 2 & 4, in same sub'n, which are described in deed from Forsythe to Sharp before mentioned. This unrecorded deed should be returned to me for record with the deed of Mr. Sharp.

* * * * *

579 I have sent you the cancelled deeds in order that they can be, if necessary, compared with your records, &c., after which they better be destroyed, I think.

Some of the property described has been sold and conveyed by the company since the date of the tax deed. In such cases the deeds are of use to you only as vouchers. Some of them cover property included in several trust deeds and are not very convenient on that account for filing.

Such explanations have been given as I thought would help in understanding the matters.

If any more tax deeds are missing please advise me. I send these in response to request in the company's recent letter to Mr. Warfield at his request.

He will, I suppose, report if he has any more on hand. Most of the deeds enclosed were filed in my office.

Very respectfully,
(Signed)

ROBT B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

580

(EXHIBIT 59.)

CHICAGO, ILL., *March 18, 1880.*

Union Mutual Life Insurance Co., Boston :

Enclosed please find quitclaim from David G. Hamilton to company (tax title) of lots 2 & 4, in W. part of bl'k 21, in C. T. sub., &c., being a portion of former security to loan No. 682, Kirchhoff.

Yours respectfully,

(Signed)

ROBT B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, No. 133 La Salle street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield, financial agent; R. B. Kendall, attorney.

581

(EXHIBIT 80.)

71 WASHINGTON ST., CHICAGO, ILL., *Oct. 27th, 1880.*

Union Mutual Life Insurance Company, Boston, Mass. :

On the 23rd Sept. last I was informed by Mr. Kirchhoff that a special agent of the U. S. Treasury had been to see him with reference to a claim of the United States upon a part of lots 2 & 4, bl'k 21, C. T. sub. of S. fraction of sec. 3, 39, 14, being the Pine St. block, & the lot on corner of Rush & Pearson Sts. resulting from a seizure of the distillery formerly occupying the ground.

It appears that Kirchhoff was some time prior to the great fire carrying on the business of a distiller upon the premises, and that the seizure was made by the collector of internal revenue for some violation of the revenue laws, and that after the usual legal proceedings in court the property was sold & bid in by the Government for \$2,500. This, M'ch 31, '71.

The fire destroyed all the records of the county, as you know, and this sale seems never to have been noted by the abstract-makers. In fact, the deed to the U. S. was never recorded. Hence there is nothing to put any one on inquiry in regard to the matter, and if it was a transaction between individuals the adverse title could not be maintained, but with the Government it is different. The statutes of limitations do not bar the United States from setting up any claim, as I understand the law. This matter has slumbered

all these years without anything having been done since the
582 sale in M'ch, 1871.

I had an interview with the agent of the Treas'y Dep't when he was here and got from him the facts before stated. He wants an offer for the Gov't title.

Since then I have had a letter from him from Washington, to which I have replied, saying I have not yet got a proposition from the Co., but would try an advisement very soon what you would do about it, and ask him that matters remain *in statu quo* for a while.

The property has been sold (23rd inst.) by the master in ch'y and bid in by the Co. I enclose rough sketch showing the location of the Gov't claim, by which you will see that the land claimed by the Gov't takes part of lots 1, 2, 3, & 4.

The owner of lot 1 is very anxious to buy from the Co. the W. 30 ft. of lot 2, and says he will give \$100 a foot for lot 4.

The Treasury agent told me he had not mentioned the matter to any of the occupants of the land except Kirchhoff, as he considered him principally interested.

I bid in lot 2 for \$9,000 & lot 4 for \$8,000, so that a purchaser would not be afraid of redemption.

This is an additional complication of the Kirchhoff case, but may not be very serious. I was given to understand by the Treas'y ag't that the Gov't did not expect a large bid, but was disposed to take anything reasonable.

The Gov't would, however, have to sell at auction, and will advertise if a reasonable bid is filed in advance.

583 Probably there would be no competition.

(Page 2, Exhibit 80.)

If I have not made this matter clear it is because of the difficulty of explaining by letter; not because the letter is too short.

Yours truly,

(Signed)

ROBT B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, 71 Washington street.

John E. De Witt, pres.; Daniel Sharp, vice-pres.; J. P. Carpenter, secretary; E. A. Warfield; R. B. Kendall, attorney.

(EXHIBIT 164.)

BOSTON, Nov. 2d, 1880.

Rob't B. Kendall, Esq., Chicago, Ill.

D'R SIR: Yours of 27th inst. at hand in relation to claim of the Government against a portion of the Kirchhoff property No. 682.

We cannot find that you state in your letter for what amount (or give an approximate of amount for which) the claim can be settled. If you can inform us what the figures are, we can then determine where we stand.

Yours truly,

(Signed)

JOHN E. DE WITT, Pres't.
F. N.

CHICAGO, ILL., Nov. 10, 1880.

Union Mutual Life Insurance Co. :

In reply to favor of the 2nd, relative to the Kirchoff case and the claim of the United States, saying you cannot find that I state for what amount claim can be settled, etc., I have to say that the Treasury ag't whom I saw did not name any sum, but intimated that a bid for something less than the am't the Gov't bid the property in for, viz., 2,500, would be acceptable.

From a recent conversation with the ass't U. S. dist. att'y here, to whom the sp'l ag't referred me, I heard that the ag't had the sum of \$2,000 in his mind.

I think there are circumstances connected with the case that may influence more favorable terms.

The difficulty is, the only records of the Gov't claim are in Washington, and consequently I cannot thoroughly investigate without going there.

Yours truly,
(Signed)

ROB'T B. KENDALL.

(Letter-head of original.)

Union Mutual Life Insurance Company, 71 Washington street.

John E. De Witt, pres. ; Daniel Sharp, vice-pres. ; J. P. Carpenter, secretary ; R. B. Kendall, attorney.

585 It is stipulated that Exhibit 168, F. V. C., shows, amongst other items of a statement of expenditures by the company on account of the property in question, such as taxes, tax deeds, costs, abstracts, repairs, etc., the following item : " May 24, 1884, p'd U. S. Gov't for deed, \$500."

It is stipulated that Elizabeth Kirchoff was not a member of the distillery firm of Julius Kirchoff Bros. and Co. at any time.

It is hereby stipulated in the above-entitled cause that the amount of items numbers 11 to 16, inclusive, of the statement of defendant attached to the report of I. K. Boyesen, master in chancery herein, and being for expenditures by the defendant on behalf of the premises in controversy from the month of August, 1878, to the 10th day of September, 1879, together with an item paid by the defendant for assessment on April 26, 1880, is in the aggregate \$742.81, and the interest thereon from the date of such expenditures to the date hereof is \$619.03, making a total of \$1,361.84 ; that the interest on the item of \$500 paid by the defendant for the claim of the United States, from the date of such payment to the date hereof, is \$255.63, and, together with said principal item of \$500, amounts to \$755.63.

It is further stipulated that the amount of the commissions allowed by the master upon the rents collected, which commissions

are not shown to have been paid by the defendant, together
 586 with the interest thereon, allowed by said master, amount to
 the sum of \$221.53; that the rents received by the defend-
 ant since the master's last report, less the commissions for collecting
 same, amount to the sum of \$555.75, and that the defendant's dis-
 bursements on account of said premises since that time amount to
 the sum of \$307.51, the amount of the receipts in excess of the dis-
 bursements being \$248.24.

It is further stipulated that the interest on the principal sum of
 \$10,000 from the date of the master's report, November 14, 1891, to
 the date hereof is \$720.

It is further stipulated that the copies of instruments hereto at-
 tached relating to the claim of the United States upon said premises
 are true copies of the original abstract so far as the same relates to
 said claim, and may be considered as a part of the evidence in the
 case as containing the substance of the original instruments and in
 the place and stead of said originals.

And it is further agreed that the said copies of instruments herein
 referred to are the same as Complainant's Exhibits 1 and 2, men-
 tioned in the evidence offered before I. K. Boyeses, master in chan-
 cery, and that the said copies are as follows:

587	Joel D. Harvey, collector of internal revenue for the first collection district of Illinois, to United States of America and their assigns.	} Doc. 422,140.

Deed dated Aug. 29, 1882, and recorded Sept. 26, 1882, in Book
 1261, pg. 294, sets forth that the assessor of internal revenue for said
 district heretofore made certain assessments under the internal-
 revenue laws of the United States of America against J. Kirchoff
 and Company, distillers, in the respect of their business in said dis-
 trict for tax upon barrels of spirits produced and grain used—that
 is to say, an assessment of \$9,248.30 on the Aug. list, 1870; an as-
 sessment of \$8,984 on the Sept. list, 1870; an assessment of \$8,653.80
 on the Oct. list, 1870; an assessment of \$8,724.90 on the Nov. list,
 1870—certified copies of which said *lots* containing the respective
 assessments aforesaid were by said assessor duly furnished and de-
 livered to the collector of internal revenue for said district within
 10 days respectively after the making of the said several assess-
 ments.

That said collector within 10 days respectively after receiving
 said several lists as aforesaid duly issued notices to said J. Kirchoff
 and Company demanding payment of said taxes so assessed and
 stating the amounts thereof respectively, and caused said notices
 to be left at their office and like notices to be sent to them by
 mail.

That on March 11, 1871, said taxes so assessed not having
 588 been paid within 10 days from and after such notices and
 demands respectively, and still remaining wholly unpaid,
 and no goods, chattels, or effects sufficient to satisfy said taxes or
 any part thereof having been found, Edmund Jussen, then collector

of internal revenue for said district, for collecting said taxes, together with the penalty and interest then in such case prescribed by law, did seize certain real estate hereinafter described, the same being the distillery premises where said J. Kirchoff and Company so carried on business, and thereupon said Jussen, collector, on March 11, in the same year, gave to said J. Kirchoff and Company notice of sale of said real estate by leaving at their usual place of business, in the city and district aforesaid, a notice in writing stating what particular estate was to be sold, describing the same with reasonable certainty, and the time when and the place where said collector proposed to sell the same, and also, on March 13, in the same year, caused a notification to the same effect to be published in the Chicago Evening Post, a newspaper then published within the county where said seizure was made, and on the day last aforesaid causes a like notice to be posted at the post-office in Chicago aforesaid (the same being the post-office nearest to said estate so seized) and in two other public places within said county, to wit, at the north and south doors of the court-house in said county, and on March 31, 1871, said Edmund Jussen, collector as aforesaid, at the hour in that behalf appointed, on the premises so seized, pursuant to said notices of sale, proceeded to sell said real estate (the same consisting of one parcel) at public auction, offering the same at a minimum price, as required by law, and, no person offering for said real estate the amount of said minimum price, said Jussen, collector, offered for the same, on behalf of said United States, \$2,500, being one-half of the cash value thereof, and declared the same to be purchased by him for said United States, and thereupon he gave to said United States a certificate of purchase, pursuant to law.

That the said real estate so sold has not been in any part or manner redeemed from said sale and said United States are still the holders of said certificate.

Now, therefore, Joel D. Harvey, collector of internal revenue for the district aforesaid and successor in office of said Edmund Jussen, in consideration of the premises and by virtue of the authority in him vested by law, grants, conveys, and confirms to said United States and to their assigns the real estate above mentioned—that is to say, all that parcel of land in Chicago, Cook Co., Ills., described as beginning on the south line of block 21, in the Canal Trustees' subdivision of the south part of fractional section 3, T. 39 N., R. 14 E., of the 3d P. M., at a point 114 feet east of the corner of Rush street and Pearson street, in Chicago, Illinois, thence running south 83 feet, thence east 64 feet 9 inches, thence north 30 feet, thence west 28 feet, thence north 53 feet, thence west 36 feet and 9 inches to the place of beginning, with buildings thereon, being premises known as the distillery of J. Kirchoff and Company, No. 80 Pearson street, Chicago, Illinois :

To have and to hold said premises, with their appurtenances, to said United States of America and to their assigns forever.

Deed attested: "In witness whereof I have hereunto set my hand and seal," &c., and signed—

[J. D. Harvey, Collector Int. Rev., First District Ill.]

JOEL D. HARVEY, [SEAL.]

Collector Internal Revenue, 1st Dist. Ills.

Certificate of acknowledgement dated Aug. 29, 1882.

Appended is:

UNITED STATES OF AMERICA, {
Northern District of Illinois. }

CHICAGO, August 25, A. D. 1882.

I hereby certify that I have prepared the foregoing deed, and that the same as to its form is approved by me.

JOSEPH B. LEAKE,

United States Attorney for said District.

Walter Evans, Commissioner of Internal Revenue, }
to
The Union Mutual — Insurance Company, a cor- } Doc. 575,813.
poration organized under the laws of Maine. }

Deed dated Sept. 10, 1884, recorded Sept. 22, 1884, in Book 1524, pg. 388, sets forth that the property hereinafter mentioned and described was, at or upon the premises, on March 31, 1871, offered for sale at public auction for internal-revenue taxes due from J. Kirchhoff and Company; that said property was then and there declared purchased for the United — by Edmund Jussen, then collector of internal revenue in the first district of Illinois, and that the same was not redeemed within one year after said sale; that after the expiration of one year from the time of said sale, to wit, on Aug. 29, 1882, Joel D. Harvey, in his capacity of collector of internal revenue, executed to the United States a deed of the same and deposited said deed with the Commissioner of Internal Revenue; that under the authority conferred upon first party by section 3208 of the Revised Statutes of the United States, as amended by section 3 of the act of March 1, 1879, and by and with the approval of the Secretary of the Treasury, the same was, in a letter addressed to Collector Joel D. Harvey under date of May 14, 1884, by first party, ordered to be sold, and that after due notice the same was sold at public vendue at the United States Government building in Chicago, Illinois, on July 19, 1884, to said company for \$500 00, said company being the highest bidder.

Now, therefore, said first party, with the approval of the Secretary of the Treasury and by virtue of the authority conferred upon him as aforesaid and in consideration of said \$500.00 to the United States paid, in his said official capacity gives, grants, bargains, sells, and conveys and confirms unto said company, its successors and assigns, all right, title, and interest of the United States at the time of said last-named sale, in the premises sold as aforesaid and de-

scribed as follows, to wit, beginning on the south line of block 21, in the Canal Trustees' subdivision of the south part of fractional section 3, T. 39 N., of R. 14 E., of the 3rd P. M., at a point 114 feet east of the corner of Rush street and Pearson street, in Chicago, thence running south 83 feet, thence east 64 feet 9 inches, 592 thence north 30 feet, thence west 28 feet, thence north 53 feet, thence west 36 feet 9 inches to the place of beginning, being the premises known in 1871 as the distillery of J. Kirchoff and Company, No. 80 Pearson street, Chicago, Cook county, Illinois.

Acknowledged Sept. 15, 1884, before John E. Beall, a commissioner of deeds for the State of Illinois in and for the District of Columbia.

Endorsed is :

"Approved this twelfth day of September, A. D. 1884. Witness my hand and official seal.

[Amer. -eptent. Thasaus. Sigil.]

H. S. FRENCH,
Acting Secretary of the Treasury."

And on the 13th day of July, 1892, came the defendant, by its solicitor (the complainant being represented by its solicitors), and moved for leave to file an amendment to its answer in said cause; which proposed amendment was in words following, to wit :

STATE OF ILLINOIS, }
County of Cook, } ^{ss :}

In the Circuit Court of Cook County. In Chancery.

ELIZABETH KIRCHOFF
vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

{ Gen'l No., 41522.
{ Term No., 3097.

593 *Amendment to the Answer of the Union Mutual Life Insurance Company to the Bill of Complaint Filed Herein on March 9th, 1883.*

And now comes the said defendant, The Union Mutual Life Insurance Company, and, by leave of the court first obtained, amends its answer to the bill of complaint in the following terms and particulars, to wit :

On the third (3rd) page of said answer and in the tenth (10th) line of said page, after the word "complainant" and before the words "said defendant," insert the following, to wit :

And the said defendant, further answering, says that by reason and in virtue of the said foreclosure decrees in the said United States court, the sale thereunder, the confirmation thereof, and all the acts and doings of said court therein the said Union Mutual Life Insurance Company acquired a title and right to the lands aforesaid ; that said right and title was acquired and is claimed

under the Constitution, statutes, and authority of the United States; that a decree for redemption or specific performance of the contract alleged in said bill would be against the right and title of said company thus acquired and hereby claimed under the Constitution, laws, and authority of the United States; that a decree for redemption or specific performance, as prayed for in said bill, or either of them, would fail to give full faith, credit, and effect to the said decrees, orders, and acts of the United States circuit court in the fore-
 594 closure proceedings aforesaid; that a decree for redemption or specific performance, as prayed for, or either of them, cannot be entered without attacking and pretending to nullify or impair the said decrees, orders, and acts of the said United States circuit court, and that, for the foregoing reasons, this court is without jurisdiction of the subject-matter of the action set forth in the bill of complaint and is without jurisdiction to enter a decree for redemption or specific performance, as prayed for in said bill of complaint.

UNION MUTUAL LIFE INSURANCE
COMPANY,

By GROSSCUP & WEAN, *Its Solicitors*.

P. S. GROSSCUP,
F. L. WEAN, *Counsel*.

Which said leave to file said amendment to defendant's answer was by the court refused.

And on the 15th day of July, 1892, the following proceedings were had in said cause:

Present: William S. Harbert, Esq., solicitor for complainant; Peter S. Grosscup, Esq., solicitor for defendant.

Mr. GROSSCUP: If your honor please, I wish it understood that so much of the abstract of the property as relates to this Government title is considered in evidence. That abstract was put in generally, but I do not know whether it was put in for that purpose.

The COURT: I think there ought to be no objection to that; consider it as in evidence.

595 Mr. GROSSCUP: Then I wish to call the attention of the court specifically, so it is a matter of record, to the fact that this title is a title derived under the Constitution and laws of the United States and authorities of the United States, and that their instance is against our claim under that authority, so that the court will know that we raise the Federal question here; also that this proposed instance upon a conveyance from that title does not give full faith and credit to the acts of the United States Government in issuing it to us that way.

The COURT: Under this provisional trust deed, I shall hold against you on that question. The order of the court will be—

Mr. GROSSCUP: To quitclaim absolutely as of this date?

The COURT: I think the decree should recite the facts in regard to this Government title, and that they be allowed the amount paid, with interest, of course.

Mr. HARBERT: They have declined to put in any evidence on that point.

The COURT: There ought to be a finding that they paid a certain amount, and allow that amount with interest.

Mr. HARBERT: Will the question of the amount be referred back to the master?

The COURT: It appears on the face of the papers.

Mr. HARBERT: It appears that this claim covers this property and other property; for the entire claim that will be over this and other property, they paid \$500.

Mr. GROSSCUP: It was paid through our office, \$500.

Mr. HARBERT: It covers other property besides this.

596 Mr. GROSSCUP: Oh, no. I am not sure but what it covers the little piece of property of Mr. Isham—a little portion of the lot occupied by Mr. Isham's homestead.

Mr. HARBERT: It should be apportioned or we have the entire title——

The COURT: Isn't it a small amount that is covered by it? If it is an insignificant amount, it would be safer for you to pay the whole amount, if it was \$50 or \$100.

Mr. HARBERT: Let it stand so.

The COURT: If you paid the whole interest on it you can draw your decree reciting that. That is my ruling. I think this is only a tax—a Government collector's tax; that you brought it up to protect your title, and you have a right to be allowed what you paid, with interest, and (to Mr. Harbert) you are entitled to a record conveyance of all their interest.

Mr. GROSSCUP: That \$500 and interest ought to be added to the general amount.

The COURT: Yes.

The above and foregoing contains all the evidence adduced and the proceedings had upon the hearing of said cause not otherwise appearing of record; and forasmuch as the matters above set forth do not fully appear of record the defendant tenders this his certificate of evidence and prays that the same may be signed and sealed by the judge of this court, which is accordingly done this 16th day of March, 1893.

M. F. TULEY, [SEAL.]

597

Judge of the Circuit Court of Cook County.

"O K."

HARBERT & DALEY.

It is stipulated that the above and foregoing certificate of evidence may be signed and sealed by said Judge M. F. Tuley as of the 16th day of March, 1893.

HARBERT & DALEY,
Solicitors for Complainant.

Presented to be signed 3, 13, '93.

FRANK J. GAULTER, *Clerk.*

598 STATE OF ILLINOIS, }
County of Cook, } 88:

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

} In Chancery. Gen-
eral Number, 41522.
Term Number, 672.

It is hereby stipulated between the parties hereto that the original certificate of evidence filed herein may be incorporated in the transcript of the record to be used on the appeal in the appellate court instead of a copy thereof, in accordance with the statute in such case provided.

HARBERT & DALEY,
Solicitors for Complainant.
FRANK L. WEAN,
Solicitor for Defendant.

599 Be it remembered that on the 15th day of February, A. D. 1893, there was filed in said court a certain appeal bond, which is in the words and figures following, to wit:

Appeal Bond, Appellate Court.

Know all men by these presents that we, Union Mutual Life Insurance Company of Portland, Maine, and D. G. Hamilton, of the county of Cook and State of Illinois, are held and firmly bound unto Elizabeth Kirchoff, also of the same county and State, in the penal sum of fifteen hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 30th day of January, A. D. 1893.

The condition of the above obligation is such that whereas the said Elizabeth Kirchoff did, on the 26th day of January, A. D. 1893, in the circuit court of Cook county, in the State aforesaid, and of the January term thereof, A. D. 1893, recover a decree against the above-bounden Union Mutual Life Insurance Company, ordering the said Union Mutual Life Insurance Company to convey to the said Elizabeth Kirchoff certain real estate in said decree described upon the payment by the said Elizabeth Kirchoff to the above-bounden Union Mutual Life Insurance Company — the sum of \$18,858.54; from which said decree of the said circuit court for Cook county the said

Union Mutual Life Insurance Company has prayed for and
600 obtained an appeal to the appellate court in and for the first district of said State:

Now, therefore, if the said Union Mutual Life Insurance Company shall duly prosecute its said appeal with effect and, moreover, comply with the decree and pay all costs, interests, and damages

rendered and to be rendered against it in case the said decree shall be affirmed in said appellate court, then the above obligation to be void; otherwise to remain in full force and virtue.

THE UNION MUTUAL LIFE INSURANCE
COMPANY,

[SEAL.] By JOHN E. DE WITT, *President*.
DAVID G. HAMILTON.

[SEAL.]

Approved this 15th day of February, A. D. 1893.

FRANK J. GAULTER, *Clerk*.

Surety O K.

HARBERT & DALEY,
Sol'rs for Kirchoff.

Extract from the Records of the Meeting of the Finance Committee of the Union Mutual Life Insurance Company Held January 30th, 1893.

Voted, That the president be authorized, in behalf of the company, to execute a bond to Elizabeth Kirchoff, of the county of Cook, in the State of Illinois, in the penal sum of fifteen hundred dollars (\$1,500) for the purpose of obtaining an appeal in a case in which said Elizabeth Kirchoff is plaintiff and said company
601 defendant, pending in the circuit court of Cook county, in the State of Illinois, wherein a decree was entered at the January term thereof, A. D. 1893.

A true copy.

Attest:

[SEAL.]

J. FRANK LONG,
Assistant Secretary.

And thereupon, on the 28th day of February, A. D. 1893, there was filed in said court a certain præcipe for record, which is in the words and figures following, to wit:

STATE OF ILLINOIS, }
Cook County, } ss:

In the Circuit Court of Cook County.

ELIZABETH KIRCHOFF

vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

} 41522.

The clerk of said court will make up an authenticated copy of the record for appellate court in the above-entitled cause and will insert:

1. Bill, filed June —, 1882.
2. Summons.
3. Demurrer, June 22d, 1882.
4. Order, Feb. 19th, 1883, overruling demurrer.
5. Answer, filed March 9th, 1883.

6. General replication.

- 602 7. Order, reference to Voss, M'ch 21st, 1883.
 8. Order, June 26th, 1883.
 9. Order, March 10th, 1887.
 10. Amended bill, filed March 10th, 1887.
 11. Proposed amended bill, filed July 12th, 1887.
 12. Order, July 12th, 1887, appeal.
 13. Order of appellate court reversing & remanding.
 14. *Procedendo*.
 15. Redocketing order, Dec. 9th, 1890.
 16. Reference to Boyesen, order, Feb. 4th, '91.
 17. Master Boyesen's report & testimony, filed Jan. 9, '92.
 18. Complainant's exceptions.
 19. Defendant's exceptions.
 20. Motion for re-reference.
 21. Order denying same, Apr. 25, '92.
 22. Order denying leave to file amendment to answer.
 23. Opinion of appellate court.
 24. Opinion of supreme court.
 25. Decree and order allowing appeal.
 26. Order extending time for certificate of evidence by stipulation.
 27. Certificate of evidence.
 28. Appeal bond.

FRANK L. WEAN,
Solicitor for Union Mutual Life Ins. Co.

603 STATE OF ILLINOIS, }
 Cook County, } ss :

I, Frank J. Gaulter, clerk of the circuit court of Cook county and the keeper of the records and files thereof in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record according to præcipe filed and hereto copied (the original certificate of evidence is incorporated herein by stipulation of the parties hereto) in a certain cause lately pending in said court, on the chancery side thereof, between Elizabeth Kirchoff, complainant, and Union Mutual Life Insurance Co., defendant.

[SEAL.] In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 16th day of March, 1893.

FRANK J. GAULTER, *Clerk*.

604 *Assignment of Errors.*

1. The circuit court erred in entering a decree allowing complainant to redeem.
2. The circuit court erred in that it did not dismiss complainant's bill for want of jurisdiction.
3. The circuit court erred in not holding that it was without jurisdiction to enter a decree allowing redemption.

4. The circuit court erred in entering a decree which in effect would nullify the decree and doings of the circuit court of the United States for the northern district of Illinois.

5. The circuit court erred in entering a decree in conflict with the decree of the United States circuit court.

6. The circuit court erred in refusing to the defendant leave to file the proposed amendment to its answer.

7. The circuit court erred in overruling defendant's exceptions to the master's report.

8. The circuit court erred in not allowing defendant compensation for collecting the rents from the property in question, so far as the same were collected by the defendant's agents.

9. The circuit court erred in not charging complainant and crediting defendant with all the necessary expenditures on account of taxes, tax liens, and tax titles, and all other necessary expenditures pertaining to property in question from the date of the trust deed to the date of this decree.

10. The circuit court erred in entering a decree directing defendant to convey to complainant tax titles to the lots in question.

605 11. The circuit court erred in entering a decree directing defendant to convey to complainant tax titles acquired by the defendant and without reimbursement therefor by the complainant.

12. The circuit court erred in entering a decree directing defendant to convey to complainant the title derived by defendant by virtue of a deed from the United States.

13. The court erred in not directing the master to ascertain the proportion of rents and taxes relating to the portion of said premises described in said deed from the Commissioner of Internal Revenue of the United States.

14. The court erred in denying the motions of defendant for a re-reference to the master to ascertain the proportion of rents, taxes, and other expenditures relating to the portion of said premises described in said deed from the Commissioner of Internal Revenue of the United States.

15. The court erred in entering a decree against the validity of titles claimed by defendant under the authority of the United States.

By reason whereof appellant prays that said decree may be reversed, &c.

FRANK L. WEAN,
Sol'r for Appellant, Union Mutual Life Ins. Co.

606 STATE OF ILLINOIS, }
First District, } ss :

In the Appellate Court in and for the First District.

UNION MUTUAL LIFE INSURANCE COMPANY,	} Assignment of Cross-
Appellant,	
vs.	
ELIZABETH KIRCHOFF, Appellee.	errors.

And now comes the said Elizabeth Kirchoff, appellee, and says that neither in the record or proceedings aforesaid is there any error in manner and form as above assigned, but that in the said record and proceedings there is manifest error in this, to wit :

1. The court erred in allowing the appellant credit for the items numbered 11 to 16, inclusive, in the statement of the appellant attached to the report of I. K. Boyesen, Esq., master in chancery, to whom said cause was referred, and each of said items, with interest thereon.

2. The court erred in sustaining the exceptions of the defendant to the master's report in so far as said master disallowed said items numbered 11 to 16 aforesaid.

3. The finding of the court as to the amount due from the complainant to the defendant upon the accounting is excessive.

4. The court erred in entering a decree against the complainant for an excessive amount.

By reason whereof the appellee prays that said decree may be modified by deducting from the amount found due the appellant the items so improperly charged against the appellee, and in
 607 all other respects that said decree be affirmed with costs to appellee.

HARBERT & DALEY,
Solicitors for Appellee.

In the Appellate Court, First District, Illinois.

UNION MUTUAL LIFE INS. Co., Appellant,	} No. 4817. Appeal Cook
vs.	
ELIZABETH KIRCHOFF, Appellee.	
	Circuit.

I, Thomas G. McElligott, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached and marked A is the original transcript of record filed in said appellate court on the 16th day of March, A. D. 1893, by said appellant.

[SEAL.] In testimony whereof I have hereunto set my hand and seal of said court, at Chicago, this 25th day of August, A. D. 1893.

THOMAS G. McELLIOTT,
Clerk of the Appellate Court, First District, Illinois.

608 And, to wit, on the day and year last aforesaid there was filed in the office of the clerk of said court a transcript of the record and proceedings of the appellate court of Illinois, first district, in words and figures following:

At a term of the appellate court begun and held at Chicago, on Tuesday, the seventh day of March, in the year of our Lord one thousand eight hundred and ninety-three, within and for the first district of the State of Illinois.

Present: Hon. Joseph E. Gary, presiding justice; Henry M. Shepard, justice; A. N. Waterman, justice; Thomas G. McElligott, clerk; James H. Gilbert, sheriff.

UNION MUTUAL LIFE INSURANCE COMPANY,	} No. 4817. Appeal
Appellant,	
vs.	
ELIZABETH KIRCHOFF, Appellee.	Cook Circuit.

Be it remembered that on the 1st day of April, A. D. 1893, it being one of the days of said March term, A. D. 1893, certain proceedings were had in said court and entered of record in words and figures following, to wit:

609 UNION MUTUAL LIFE INSURANCE	} 4817. Appeal Cook
COMPANY	
vs.	
ELIZABETH KIRCHOFF.	Circuit.

On stipulation of the parties herein it is ordered by the court that the time in which to file appellant's briefs and abstracts herein be extended to April 15th, 1893, and that appellee may have until April 30th in which to file her briefs in said cause.

And afterwards, on the 19th day of June, A. D. 1893, the following proceedings were had and entered of record in said cause, to wit:

UNION MUTUAL LIFE INSURANCE Co.	} No. 4817. Appeal from
vs.	
ELIZABETH KIRCHOFF.	
	Cook Circuit.

This cause, having this day been reached in the call of the docket, was argued by counsel for the appellant, and the court, not being fully advised in the premises, doth order that said cause be taken under advisement.

And afterwards, on the 4th day of August, A. D. 1893, the following proceedings were had and entered of record in said cause, to wit:

- 610 UNION MUTUAL LIFE INSURANCE }
 COMPANY, Appellant, } No. 4817. Appeal from
 vs. } Cook Circuit.
 ELIZABETH KIRCHOFF, Appellee. }

On this day come again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the decree aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error:

Therefore it is considered by the court that the decree aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said Elizabeth Kirchoff, appellee, recover of and from the said Union Mutual Life Insurance Company, appellant, her costs by her in this behalf expended, to be taxed, and that she have execution therefor.

And afterwards, on the 14th day of August, A. D. 1893, the following proceedings were had and entered of record in said cause, to wit:

- 611 UNION MUTUAL LIFE INSURANCE }
 COMPANY } No. 4817. Appeal from
 vs. } Cook Circuit.
 ELIZABETH KIRCHOFF. }

This day came appellant, by its counsel, and moved the court for an appeal from the order and judgment of this court in said cause to the supreme court of Illinois; and the court, being fully advised in the premises, doth order that an appeal be allowed herein to the northern grand division of said supreme court on condition that appellant doth within twenty days from this date execute and file in said cause a good and sufficient appeal bond, conditioned according to law, in the penal sum of two hundred and fifty dollars, with surety thereto to be approved by the court.

And afterwards, on the 25th day of August, A. D. 1893, the following proceedings were had and entered of record in said cause, to wit:

- 612 UNION MUTUAL LIFE INSURANCE }
 Co. } No. 4817. Appeal from
 vs. } Cook Circuit.
 ELIZABETH KIRCHOFF. }

This day came appellant, by his counsel, and presented his certain appeal bond in said cause in the penal sum of two hundred and fifty dollars, with ——— as surety thereto; and the court, being fully satisfied as to the qualifications of said surety, doth

order that said appeal bond be, and the same is hereby, taken, approved, and filed herein.

And afterwards, on the same day, to wit, the 25th day of August, A. D. 1893, an appeal bond was filed in said cause; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Union Mutual Life Insurance Company of Portland, Maine, and David G. Hamilton, of the county of Cook and State of Illinois, are held and firmly bound unto Elizabeth Kirchoff, also of the same county and State, in the penal sum of two hundred and fifty (\$250) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly, severally, and firmly by these presents.

613 Witness our hands and seals this nineteenth day of August, A. D. 1893.

UNION MUTUAL LIFE INSURANCE CO.,
By JOHN W. DE WITT, *President*.
DAVID G. HAMILTON.

[SEAL.]

The condition of the above obligation is such that whereas the said Elizabeth Kirchoff did on the 26th day of January, A. D. 1893, in the circuit court of Cook county, in the State aforesaid, and of the January term thereof, A. D. 1893, recover against the above-bounden Union Mutual Life Insurance Company a decree directing the said Union Mutual Life Insurance Company to convey to the said Elizabeth Kirchoff certain real estate in said decree described upon the payment by the said Elizabeth Kirchoff to the said Union Mutual Life Insurance Company — the sum of \$18,858.54 and interest thereon, which said decree was afterwards, to wit, on the 4th day of August, 1893, affirmed by the appellate court of Illinois for the first district, from which order of affirmance and judgment of the said appellate court the said Union Mutual Life Insurance Company has prayed for and obtained an appeal to the supreme court of Illinois for the northern grand division:

Now, therefore, if the said Union Mutual Life Insurance Company shall duly prosecute its said appeal with effect and, moreover, comply with the said decree and order and pay all costs rendered and to be rendered against it in case the said decree shall be affirmed
614 in the said supreme court, then the above obligation to be void; otherwise to remain in full force and virtue.

UNION MUTUAL LIFE INSURANCE CO.,
By JOHN E. DE WITT.
DAVID G. HAMILTON.

[SEAL.]
[SEAL.]

I, Thomas G. McElligott, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order and judgment and all other proceedings and appeal bond of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 25th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

[COURT SEAL.]

THOMAS G. McELLIGOTT,

Clerk of the Appellate Court of the First District.

615

Assignment of Errors.

1. The appellate court erred in that its findings and judgment are contrary to the law.
 2. The appellate court erred in affirming the decree of the circuit court of Cook county.
 3. The appellate court erred in affirming a decree entered without jurisdiction by the circuit court.
 4. The appellate court erred in not holding that the circuit court of Cook county was without jurisdiction to enter a decree allowing redemption from a trust deed which had been foreclosed by decree of the United States court.
 5. The appellate court erred in affirming a decree of the circuit court of Cook county which in effect would nullify the decree and doings of the United States circuit court for the northern district of Illinois.
 6. The appellate court erred in affirming a decree in conflict with a decree of the United States circuit court.
 7. The appellate court erred in not charging appellee and crediting appellant with all the necessary expenditures on account of tax title, tax liens and taxes, and all other necessary expenditures by appellant pertaining to the property in question from the date of the trust deed to the date of the decree.
 8. The appellate court erred in affirming a decree directing appellant to convey to appellee tax titles acquired by appellant to the lots in question.
 - 616 9. The appellate court erred in affirming a decree directing appellant to — appellee tax titles acquired by appellant without reimbursement therefor.
 10. The appellate court erred in affirming a decree directing appellant to convey to appellee the title derived by appellant by virtue of a deed from the United States.
 11. The appellate court erred in affirming a decree against the validity of titles claimed by appellant under an authority of the United States.
 12. The appellate court erred in refusing to consider and decide the question of the jurisdiction of the court over the subject-matter of the suit.
 13. The appellate court erred in that the judgment and decree by it sustained does not give full faith and credit and effect to the decree, proceedings, and acts of the United States court under which appellant acquired title to the premises in question.
- By reason whereof appellant prays that said judgment and decree may be reversed, etc.

FRANK L. WEAN,

Solicitor for Appellant, Union Mutual Life Insurance Company.

617 *Opinion of Appellate Court, Filed in Supreme Court of Illinois in Compliance with Rule 29 of Supreme Court.*

GARY, P. J.:

On a former appeal this case is reported in 33 Ill. App., 607, and 133 Ill., 368. What was then decided cannot now be reversed, and the reasons then given for such decisions, are, on this appeal, the law of the case.

Dilworth v. Curts, 139 Ill., 508, and cases there cited, are but a few among many. We shall, therefore, omit any reference to matters of defense by the appellant, which, if valid, existed before the first appeal. If we made a mistake, in which the Supreme Court concurred, or if better arguments can now be made for the appellant than were then made, the result cannot be changed. The only question now open is upon the account as taken.

The appellant claims title under a tax deed, but as it acquired that title before the first hearing below, and even has never set it up as a bar, its validity need not be considered.

On the last hearing the court found, and the evidence supports the finding, that the agreement under which the appellee is entitled to relief, was made in August, 1878, and, therefore, in the account allowed to the appellant disbursements after that month. The appellee assigned that as a cross-error. Such allowance is somewhat inconsistent with the interest not beginning until September 10, 1879, but it is now too late to say that such interest should have begun a year earlier, as that date was fixed on the former appeal.

617½ The appellant was not bound to do more than release the title to the appellee upon payment; all charges upon the land for taxes, etc., were her burden from the time the agreement was made. As the appellant was not bound to covenant against anything, she was to take the land as it was.

It follows that everything paid by the appellant, after the agreement was made, in discharge of burdens upon the land should be allowed to it in the account. But whatever the appellant had paid before the agreement was made ought not to be, and was not, allowed.

The ten thousand dollars was the price to the appellant of the interest of the appellant as circumstances then were; that interest to be protected by the subsequent quitclaim deed and foreclosure.

The effect of the agreement between the parties, as it was found to be, both by this court and the Supreme Court, was to apportion, of the total amount to which the appellant was entitled at the time the agreement was made, the sum of ten thousand dollars, as the part to be paid in redemption of the land in controversy.

There is no error and the decree is affirmed.

Affirmed.

618

OCTOBER 10, 1893.

THE UNION MUTUAL LIFE INSURANCE COM-
PANY

vs.

ELIZABETH KIRCHOFF.

3134. Appeal from
First District.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court and it appearing to the court that — —, appellant, hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee, — —, having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

619 At a supreme court begun and held at Ottawa, on Tuesday, the sixth day of March, in the year of our Lord one thousand eight hundred and ninety-four, within and for the northern grand division of the State of Illinois.

Present: David J. Baker, chief justice; Benjamin D. Magruder, justice; Alfred M. Craig, justice; Jesse J. Phillips, justice; Joseph M. Bailey, justice; Jacob W. Wilkin, justice; Simon P. Shope, justice; Maurice T. Moloney, attorney general; William W. Taylor, sheriff; Alfred H. Taylor, clerk.

Be it remembered, to wit, on the thirty-first day of March, A. D. 1894, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

THE UNION MUTUAL LIFE INSURANCE
COMPANY

v.

ELIZABETH KIRCHOFF.

No. 3134. Appeal from
Appellate Court of Illi-
nois, First District.

And now, on this day, this cause having been argued by counsel, and the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error:

Therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellee recover of and from the said appellant her costs by her, in this behalf expended, and that she have execution therefor.

620

Opinion by Wilkin, J.

This cause was begun in the circuit court of Cook county by appellee against appellant, where a decree was entered dismissing the bill. On appeal to the appellate court of the first district that decree was reversed and the cause remanded with directions to have an account stated in the manner therein designated, and when the amount due appellant was ascertained to enter a decree that upon the payment thereof, with interest, within ninety days, it should convey to appellee the lots in question, and that she recover her costs; but if she failed to make such payment her bill should be dismissed at her cost.

That judgment was affirmed by this court on appeal by the company (133 Ill., 368). As shown by the opinion then filed, the bill was brought to redeem or enforce a reconveyance of certain real estate to which the company had acquired title by quitclaim deed from Mrs. Kirchoff and husband and under a decree of foreclosure in the circuit court of United States.

The controversy between the parties to the bill then was whether a contract had been entered into between the parties whereby the company, in consideration of a quitclaim deed by Mrs. Kirchoff to it and the payment of a certain sum of money, had agreed to reconvey to her the lots in question, and whether, if such an agreement was made, the complainant was entitled under all the facts of the case to enforce it in this action. The terms of the contract and all the facts are there fully stated and the merits of the case settled adversely to the company.

On the remandment of the cause to the circuit court it
621 was referred to a master to state the account, in conformity with the directions given in the opinion of the appellate court.

On the coming in of his report the same was approved and a decree entered requiring the complainant to pay the defendant \$18,858.54 and interest within ninety days, and thereupon the defendant to convey to her the premises.

From this decree the company appealed to the appellate court, where a judgment of affirmance was entered, and it now appeals to this court.

Much of the argument of counsel for appellant is devoted to an effort to show a want of jurisdiction in the circuit court of Cook county over the subject-matter of this litigation.

Whether upon this second appeal that is an open question we do not deem it important to determine, being clearly of the opinion that the position of counsel is untenable. It is said the suit is

brought to review and set aside a decree of the United States circuit court, and the bill is treated throughout the discussion as hostile to the foreclosure proceeding in that court or as attempting to obtain relief properly available in that action.

This is a misapprehension of the scope and purpose of complainant's bill. In our former opinion we said: "After the settlement had been concluded it turned out that certain encumbrances existed against some of the property which were subsequent to the trust deed, but which would take priority to the quitclaim deed executed by complainant and her husband. It therefore became necessary, in order to obtain a perfect title, to go on with the foreclosure proceedings, which was done." This statement is based upon an allegation of the bill to the effect that, it being represented to the complainant by the attorney of the company that it would be necessary to foreclose the trust deed in order to make good the title in the company to the lots before they could take a mortgage thereon for the installments of redemption money, it was agreed between the parties that the agreement for redemption should not be executed until after the title had been perfected in the company by foreclosure, but in the meantime complainants should execute and deliver to the company her quitclaim deed and should interpose no defense to such foreclosure. The allegation was found in the opinion above referred to, sustained by proofs, and is conclusive of that fact upon this appeal. The foreclosure decree in the Federal court was therefore as much the result of the agreement relied upon by complainant as was the making of the quitclaim deed by her. So far from this being an attempt to review, modify, or set aside the decree of the United States circuit court, the right of action is predicated in part at least upon it.

Whether the bill be called a bill to redeem or given another name can in no way affect the question of jurisdiction in the State court. The relief sought is the enforcement of a contract to reconvey the property in question, which we have already held the complainant entitled to. Her rights grow out of the alleged contract and not by reason of anything that was done or could have been done in the Federal court in the foreclosure suit.

That a court of equity has jurisdiction to enforce the contract, whether it be called a contract to redeem or to reconvey, is, we think, too clear for argument. There is nothing in *Windett vs. The Connecticut M. L. Ins. Co.*, 130 Ill., 621, or *Maloney et al. vs. Dewey et al.*, 127th Ill., 325, to the contrary.

On the accounting the company claimed credit for items of money expended in payment of taxes and the purchase of tax titles against the property prior to the agreement to reconvey, which, on objection by complainant, were disallowed. This ruling is assigned for error, but we think it is in conformity with the fair and reasonable construction of the contract. The complainant was to pay the full appraised value of the lots, upon which the defendant was to reconvey to her. Certainly it was not intended that such payment should be made and the conveyance executed, and yet the company retain an interest in or lien upon the property. The parties are presumed

to have entered into the contract with a view to the then condition of the property and all existing liens and claims in favor of the company against it, and had they intended appellee to pay, in addition to the \$10,000, such claims, they certainly would have so stated in the agreement.

It appears that prior to September the 10th, 1884, the United States had seized the property for certain revenue taxes due from a firm then occupying it as a distillery, Mrs. Kirchoff, the
624 owner of the property, being in no way connected with that firm.

The property was sold, the Government bidding it in and taking a deed for it. On the date named, by a commissioner of internal revenue, it conveyed to appellant, and it now attempts to set up that title against appellee in this suit. It paid the Government \$500 for the title or interest it got by the commissioner's deed, and in the account stated appellee was required to repay it that amount with interest. We think it clear upon the authority of *Mansfield vs. Excelsior Refining Co.*, 135 U. S., 326, cited in the argument of counsel for appellee, the United States took no title by its deed as against Mrs. Kirchoff. Therefore by its conveyance to appellant the latter at most took only the lien for delinquent taxes, and, being fully indemnified for the money expended in obtaining such lien, complete justice has been done it.

But if it were otherwise appellant cannot set up any right under its deed from the Government, because those rights were acquired long prior to the rendering of the first decree in the circuit court, and consequently to the submission of the case in this court upon the prior appeal.

Nothing is better settled than that "where a cause has been reviewed by this court and remanded with directions as to the decree to be entered, a party on a subsequent appeal cannot assign for error any cause that accrued or existed prior to the judgment
625 of this court. All errors not assigned will be considered as waived and cannot afterwards be urged." *Hook vs. Richardson et al.*, 115 Ill., 431; *Village of Brooklyn vs. Orthwein*, 140th Ill., 620, & cases cited. There is no error in this record, so far as we have been able to discover, and the judgment of the appellate court is therefore affirmed.

Affirmed.

626 Know all men by these presents that we, Union Mutual Life Insurance Company of Portland, Maine, as principal, and David G. Hamilton and John Wain, of Chicago, Illinois, as sureties, are held and firmly bound unto Elizabeth Kirchoff in the full and just sum of one thousand dollars, to be paid to the said Elizabeth Kirchoff, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-six. _

Whereas lately, at a term of the supreme court of the State of Illinois for the northern grand division, in a suit pending in said court between Union Mutual Life Insurance Company, appellant, and Elizabeth Kirchoff, appellee, a judgment was rendered against the said Union Mutual Life Insurance Company, and the said Union Mutual Life Insurance Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the suit aforesaid, and a citation directed to the said Elizabeth Kirchoff, citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Union Mutual Life Insurance Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

627

UNION MUTUAL LIFE INSURANCE
COMPANY,

[SEAL.]

By ARTHUR L. BATES, *Vice-President.*
DAVID G. HAMILTON.
JOHN WAIN.

[SEAL.]

[SEAL.]

Sealed and delivered in presence of—

JOSIAH H. DRUMMOND,

To A. L. B.

FRANK L. WEAN,

To D. G. H. & J. W.

Approved by—

H. B. BROWN,

*Associate Justice of the Supreme
Court of the United States.*

I hereby certify that in my opinion the sureties upon the attached bond are good and sufficient for the penalty thereof.

March 13, 1896.

JOHN W. SHOWALTER,
U. S. Circuit Judge, 7th Circuit.

(Endorsed :) Filed March 27, 1896. A. H. Taylor, clerk.

Endorsed on cover: Case No. 16,253. Illinois supreme court. Term No., 155. The Union Mutual Life Insurance Company, plaintiff in error, vs. Elizabeth Kirchoff. Filed April 11th, 1896.

Supreme Court of the State of New York

DECEMBER TERM, 1904

IN SENATE

JAMES C. BROWN

UNION MUTUAL LIFE INSURANCE COMPANY

Plaintiff in Error

ELIZABETH KIRKMAN

Defendant in Error

IN SENATE TO THE HONORABLE CHIEF JUSTICE

**MOTION TO DISMISSE AND BRIEF IN SUPPORT
THEREOF.**

WILLIAM S. HARRERT

GEORGE B. DALEY

Attorneys at Law

For Petitioner: Messrs. Harrert & Daley, 25 Nassau St., New York



IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1897.

No. 155.

UNION MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.

ELIZABETH KIRCHOFF,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS.

Now comes Elizabeth Kirchoff, the defendant in error, by George R. Daley, her solicitor, and moves the court to dismiss the writ of error herein, for want of jurisdiction, and further moves that in case the court shall find it has jurisdiction of the case, then that it affirm the judgment of the Supreme Court of the State of Illinois, because it is manifest the said writ of error was taken for delay only, and that the question on which the jurisdiction of the court depends is so frivolous as to not need further argument.

GEORGE R. DALEY,
Solicitor for Defendant in Error.

BRIEF AND ARGUMENT IN SUPPORT OF MOTION.

This case was before this court at the October term 1895, upon a former writ of error to the Supreme Court of the State of Illinois, to review a judgment rendered by that court on June 12, 1890, which writ upon a hearing, was dismissed upon the ground that the judgment of the Supreme Court of the State of Illinois was not a final judgment.

Union Mutual Life Ins. Co. v. Kirchoff, 160
U. S., 374.

The decision of the Supreme Court of the State of Illinois, above referred to, affirmed the judgment of the Appellate Court of the First district of Illinois, which reversed and remanded the cause to the Circuit Court of Cook County, for the purpose of an accounting between the parties as prayed in the bill, and thereupon entering a decree in favor of defendant in error; and this court held that until such accounting was had the decree was not final.

After the decision of the Supreme Court of Illinois, to which the former writ of error was prosecuted, the accounting was had in the Circuit Court of Cook County and a final decree entered. The cause was appealed by the company to the Appellate Court of the First district, which affirmed the decree of the Circuit Court (51 Ill. App., 67), from which decision an appeal was again prosecuted to the Supreme Court of the state, which affirmed the judgment of the Appellate Court (149 Ill., 536). It is to reverse this last judgment of the State Supreme Court that this writ of error is prosecuted.

STATEMENT OF FACTS.

The facts are stated in the report of the case upon the hearing of the former writ of error. We quote same from that report as follows (160 U. S., 374):

"On May 8, 1871, Julius Kirchoff, being engaged in the distillery business in Chicago, borrowed \$60,000 of the Union Mutual Life Insurance Company, and to secure the payment thereof, executed together with his wife, Elizabeth, and her mother, Angela Diversey, a joint judgment note for \$60,000 and a trust deed covering certain real estate in Chicago, belonging to Kirchoff and his wife, and certain other property, including a farm in Cook County, owned by Mrs. Diversey. The money received from the loan was put in the bank to the credit of the firm of Kirchoff Bros. & Co., which soon after failed.

"In 1876, default having been made in the payment of interest and taxes, judgment was taken against Mrs. Diversey on the note after certain unsuccessful negotiations towards funding the indebtedness into a new loan at a lower rate of interest, and on July 11, 1878, proceedings were commenced in the Circuit Court of the United States to foreclose the trust deed. The bill in addition sought to cure a misdescription of the property belonging to Mrs. Diversey, who filed an answer denying the right of the company to cure the misdescription and averring that the notes and mortgage were procured from her by misrepresentation.

"From this time the relation of the parties seems to

"have remained unchanged until June, 1879, when an
 "agreement was reached by which the company re-
 "leased to Mrs. Diversey its claim upon forty acres
 "of the land belonging to her, and she executed to it
 "a warranty deed for the remainder of the premises.
 "About the same time, Mrs. Kirchoff and her hus-
 "band executed a quitclaim deed of all the property
 "belonging to them and included in the mortgages.
 "The deed from Mrs. Diversey was immediately placed
 "on record, but the deed from the Kirchoffs was with-
 "held by the agent and attorney of the insurance com-
 "pany.

"It was claimed by Mrs. Kirchoff that during the ne-
 "gotiations which culminated in the execution of the
 "above deeds, it was agreed that the insurance com-
 "pany should reconvey to her two lots included in her
 "deed one of which was then occupied as a homestead,
 "the other cornering upon it, but facing the other way;
 "that the price at which the reconveyance should take
 "place was their valuation at a previous appraisement
 "made by one Rees, viz: \$7,500 and \$2,500, respectively,
 "and that Mrs. Kirchoff was to execute in payment
 "therefor her notes for \$10,000, extending over a period
 "of ten years, bearing interest at six per cent., and
 "secured by a mortgage upon the two lots. It seems
 "there were certain intervening claims on one of the
 "lots, growing out of a sheriff's deed, executed pur-
 "suant to a sale on a judgment against Mrs. Kirchoff,
 "rendered subsequently to the original trust deed,
 "but prior to the deed from Kirchoff and wife to the
 "company, which rendered necessary a further prose-
 "cution of the foreclosure proceedings in order that the
 "company might obtain a good title to the premises so

"as to convey a clear title to Mrs. Kirchoff and take
 "from her a mortgage which would be a first lien
 "thereon. It is claimed that this matter was explained
 "to Mrs. Kirchoff. her husband and agent, and he was
 "assured that the prosecution of the foreclosure pro-
 "ceedings would not in any manner affect the agree-
 "ment which had been made, but that as soon as the
 "company got a deed from the master in chancery, it
 "would carry out its part of the contract, by conveying
 "to Mrs. Kirchoff the premises in question and would
 "then take the mortgage from her. She alleged that
 "relying upon this agreement, no defense was made to
 "the foreclosure proceedings, by her, and the same
 "were prosecuted to a decree, and the master's deed
 "issued thereon to the insurance company January 21,
 "1882. The object of the bill in this case was to insist
 "upon this right of redemption in accordance with its
 "terms.

"The insurance company on the other hand, con-
 "tended that an inspection of the record showed that
 "no such agreement was ever concluded and that the
 "state court was bound by the decree of the Federal
 "court foreclosing the mortgage, and had no jurisdic-
 "tion to review it. It was not disputed that proposi-
 "tions similar to the so-called agreement were dis-
 "cussed between the Kirchoffs and the agents of the
 "insurance company, or that assurances were given
 "by the latter of the probable willingness of the insur-
 "ance company to sell the land on the terms named;
 "but it is claimed that when the insurance company
 "was advised of the proposition, it was instantly and
 "unequivocally declined and this action of the com-
 "pany communicated to Mrs. Kirchoff in time to pre-

"vent any injury to her from the quitclaim deed. "That, after having been thus fully advised, she elected "to deliver the deed, and in that manner get the benefit "of the release from her indebtedness.

"A demurrer was filed to the bill which was over-
 "ruled, when defendant answered, denying the agree-
 "ment for redemption set forth in the bill, and also set
 "ting up the statute of frauds as a defense. The case
 "coming on for hearing upon pleadings and proofs, the
 "bill was dismissed for want of equity. An appeal
 "was taken to the state Supreme Court which was dis-
 "missed upon the grounds that the case should have
 "gone to the Appellate Court. 128 Illinois, 199. Where-
 "upon the complainant sued out a writ of error from
 "the Appellate Court of the First district of Illinois to
 "the Circuit Court of Cook County and upon a hearing
 "in the Appellate Court the decree of the Circuit Court
 "was reversed, with directions to enter a decree in ac-
 "cordance with the opinion of the Appellate Court. 33
 "Illinois App., 607. This opinion was not sent up
 "with the record in this case. From the decree of the
 "Appellate Court, the insurance company prosecuted
 "an appeal to the Supreme Court of the state, which
 "affirmed the decree of the Appellate Court. 133 Illi-
 "nois, 368. To reverse that decision, this writ of error
 "was sued out."

The foregoing is a statement of the case as it ap-
 peared to this court upon the former hearing. The
 complete record of the case is now before the court,
 and the decree which is sought to be reviewed, is un-
 questionably final.

During the prosecution of the foreclosure proceeding
 in the United States Circuit Court, a receiver was

appointed of all the property, and about nine months after the confirmation of the report of sale the receiver filed a petition in said cause stating that Julius Kirchoff was in possession of the premises in question and refused to pay rent therefor and asking for a writ of assistance to put him (the receiver) in possession. (Pr. Rec., 192.)

To a rule to show cause why such writ should not issue the husband of defendant in error filed an answer setting up the agreement in question as having been made between the company and himself and asking that the writ do not issue lest his rights be prejudiced. (Pr. Rec., 106.) The court nevertheless, issued the writ, and it may be contended that this decision by the court operated as a *res adjudicata* of the issues involved in this case and that the decree enforcing the claim of defendant in error does not give full faith and credit to this order of the United States Circuit Court.

The present record further discloses that in 1871 title to the premises in question was in appellee, Elizabeth Kirchoff. The distilling firm of Julius Kirchoff & Co. then occupied the premises for a distillery. They failed to pay certain revenue taxes and the United States seized the distillery and the ground upon which it was located and proceeded to dispose of same by statutory notice and sale, being itself the purchaser at that sale. The deed to the United States by the collector of internal revenue, was issued in 1882 and on September 10, 1884, after the matter had been called to the attention of the company by Kirchoff the United States by Walter Evans, Commissioner of Internal Revenue,

conveyed to the plaintiff in error all the right, title and interest of the United States in and to the said premises. The defendant in error was not a member of the distilling firm of Kirchoff & Co., was not in any manner a party to the proceedings upon the seizure and had no notice thereof.

The plaintiff in error paid to the United States for its claim upon the premises the sum of \$500 and in the accounting in this case was allowed that amount with interest. It may be claimed that the decree in this case was equivalent to a decision against the validity of the said deed from the commissioner of internal revenue and that for that reason this court has jurisdiction.

The state courts found that the contentions of the complainant were established by a preponderance of the evidence and decreed in her favor as prayed. The Supreme Court of Illinois stated the agreement as found by it to be as follows:

"It was a part of the arrangement under which the complainant was to obtain the two lots in controversy that a decree of foreclosure should be entered, and that the premises should be sold under such decree. The decree was rendered and the sale made by consent for the purpose of clearing the different tracts of land mentioned in the quitclaim deed from certain encumbrances." * * *

"The substance of the agreement was that complainant was to have the two lots in question, notwithstanding her deed in September, 1879, and notwithstanding the decree of foreclosure and sale thereunder, upon the payment of \$1,000, and the execution

"of her notes secured by a mortgage on the premises for the balance, payable \$1,000 each year for nine years, with six per cent. interest." (Pr. Rec., 311.)

We shall not discuss the evidence in the record as we understand that, according to the practice of this court, where the facts are found by the state court, such finding will be considered conclusive.

Egan v. Hart, 165 U. S., 188.

And the opinion of the state court will be considered part of the record and looked to to ascertain the questions presented and facts found.

Egan v. Hart, *supra*.

If this court has jurisdiction to review the judgment of the Supreme Court of the State of Illinois, it is by virtue of Sec. 709 of the Revised Statutes of the United States, which provides in substance that the final decree of a state Supreme Court may be re-examined by this court where any title, right, privilege or immunity is claimed under an authority exercised under the United States, and the decision is against such title, right, privilege or immunity specially set up or claimed under such authority. In support of the claim of jurisdiction only three possible contentions can be made:

1. That the courts of the State of Illinois decided against the title of the company derived under the decree of foreclosure in the United States Circuit Court, the master's sale and deed thereon.

2. That the decision reviews a matter which is *res adjudicata* by reason of the decision on the writ of assistance above referred to.

3. That the courts of the State of Illinois decided against the title of the company derived under the deed

from the commissioner of internal revenue above referred to.

We shall consider these possible claims of jurisdiction in the order mentioned.

In order that a party may avail himself of the privileges of Sec. 709, he must present his claim to the state courts in apt time; and unless a Federal question is necessarily involved in the decision by the Illinois court then the plaintiff in error is not in a position to now claim the benefit of said Sec. 709, because nowhere in the record does it appear that the plaintiff in error set up such claim until after the case had been reversed by the Appellate Court with directions to enter a decree in favor of complainant, and that decision of the Appellate Court had been affirmed by the Supreme Court of the state.

Upon the accounting in the Circuit Court the plaintiff in error asked leave to file an amendment to its answer, in which proposed amendment it made the claim that its title was acquired by virtue of an authority exercised by the United States, and that a decree against it would not give full faith, credit and effect to that authority. As the rights of the parties had been theretofore settled by the Appellate Court, and nothing was left to be done but to take an accounting, the court very properly refused to allow the amendment to be made. (Pr. Rec., 502.)

But even if we consider the claim under the Federal decree as having been properly and timely presented in the state court, or as necessarily involved in its decision, there is no ground for the claim that the decree of the state court does not give full faith and credit to the decree of the United States Circuit Court.

POINTS IN SUPPORT OF MOTION.

I.

THE TITLE ACQUIRED UNDER THE FORECLOSURE PROCEEDING IN THE UNITED STATES CIRCUIT COURT IS NOT ATTACKED BY THE BILL NOR DISCREDITED BY THE DECREE. (Brief, p. 14.)

a. The bill merely alleges an agreement and asks that it be enforced.

Pr. Rec., 22.

Ill. Sup. Court (Pr. Rec., 516).

b. The perfecting title by the foreclosure proceeding was part of the agreement.

Id.

c. The decree does not disturb those proceedings, but merely directs a conveyance by the company pursuant to the agreement.

Ill. App. Court (Pr. Rec., 318).

Circuit Court Decree (Pr. Rec., 409).

II.

THE APPLICATION FOR WRIT OF ASSISTANCE PLACED IN ISSUE ONLY THE RIGHT OF POSSESSION OF THE PREMISES AS BETWEEN JULIUS KIRCHOFF AND THE RECEIVER. THE RIGHTS OF THE PARTIES HERETO WERE IN NO MANNER AFFECTED BY THE ORDER ISSUED ON SAID APPLICATION. (Brief, p. 21.)

a. The rights of the parties to this suit could not be determined in the foreclosure case for the reason, among

others, that the court had lost all jurisdiction over said cause.

b. The application for the writ put in issue only the possession and not title.

c. Neither of the parties to this case was a party to that proceeding.

d. The order entered on that application is not a bar for the further reason that the purpose of the proceeding was not to settle the title, and the court did not have jurisdiction of either the parties to or subject-matter of this cause.

Aspden v. Nixon, 4 How., 467.

III.

THE DEED FROM THE UNITED STATES EXECUTED BY THE COMMISSIONER OF INTERNAL REVENUE OPERATED MERELY AS A RELEASE OF ITS LIEN FOR TAXES UPON THE PREMISES AND NOT AS A TITLE. IT WAS NOT SET UP AS A DEFENSE AND THEREFORE CANNOT NOW BE URGED AGAINST THE DECREE. (Brief, p. 24.)

a. The deed to the government was inoperative as against defendant in error.

Mansfield v. E. Ref. Co., 135 U. S., 326.

b. The deed from the government to plaintiff in error released the lien for taxes and the company was allowed in the accounting the amount it had paid for that release.

Ill. Sup. Court (Pr. Rec., 518).

c. *The claim under said deed not having been set up as a defense in apt time was barred.*

Ill. Sup. Court (Pr. Rec., 518).

Story's Eq. Plead., Sec 393.

1 Van Fleets' Former Adj., 492.

d. *The decision of the Illinois Supreme Court was based as well upon this latter question which relates to rules of practice in the state courts as upon the insufficiency of the deed.*

Pr. Rec., 518.

e. *This question of practice is not one of a Federal nature.*

L. I. W. I. Co. v. Brooklyn, 166 U. S., 685.

f. *Where the decision of the state court is based upon two grounds, one of which is not of a Federal nature and is sufficient in itself to support the decision, this court has no jurisdiction.*

Bacon v. Texas, 163 U. S., 207.

IV.

IF IT SHOULD APPEAR THAT A FEDERAL QUESTION IS INVOLVED IN THIS CASE, THEN THE JUDGMENT OF THE ILLINOIS SUPREME COURT SHOULD BE AFFIRMED UNDER RULE 6 OF THIS COURT AS NEEDING NO FURTHER ARGUMENT. (Brief, p. 28.)

a. *Its judgment was clearly in harmony with the decisions of this court.*

Peugh v. Davis, 96 U. S., 332.

Villa v. Rodrigue, 79 U. S., 323.

b. This litigation has been pending for over fifteen years and its further prosecution is for the purpose of delay only.

I.

THE TITLE ACQUIRED UNDER THE FORECLOSURE PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT IS NOT ATTACKED BY THE BILL NOR DISCREDITED BY THE DECREE.

The bill of complaint of defendant in error alleges that after the delivery of her deed said foreclosure proceeding was prosecuted by consent for the purpose of clearing the title to the premises, and that there was an agreement that when the company got its deed from the master it would convey the premises to her. This the defendant (here plaintiff in error) in its answer, denied. The validity of the title derived under the foreclosure proceedings was not called in question. The bill admitted that such a title existed, and the whole controversy rested entirely upon whether there was an agreement for a conveyance by the company to the complainant which she could enforce in a court of equity. The prayer of her bill is not that the decree in the foreclosure proceeding and the conveyance by the master, pursuant thereto be set aside, but that the company be compelled to convey to her. (Pr. Rec., 25.)

Upon reference to the opinion of the Appellate Court (Pr. Rec., 317), it will appear that the court in entering its decree did not attempt to set aside the title acquired by the company under and by virtue of the foreclosure proceeding, but expressly directed the Circuit

Court to take an account and "when the amount due "the company is ascertained to enter a decree that "upon the payment of that amount, with interest "thereon, within ninety days thereafter, the company "convey to her." (Pr. Rec., 318.) The decree of the Circuit Court conforms strictly to this order. (Pr. Rec., 409.)

The Appellate Court found that "the foreclosure proceedings went on after the conveyances to cut off an "intervening title but with the agreement that it should "not affect the agreement as to the lots described." (Pr. Rec., 318.)

In passing on the contention that the matters embraced in the bill should have been set up as a defense to the foreclosure proceeding, the Illinois Supreme Court said (Pr. Rec., 311): "It is also denied "(claimed) that complainant's failure to assert the alleged agreement in the foreclosure proceedings is a "bar to its assertion here, that the proceedings in the "foreclosure are conclusive. We are unable to concur "in this position. It was a part of the arrangement "under which the complainant was to obtain the two "lots in controversy, that a decree of foreclosure "should be entered, and that the premises should be "sold under such decree. The decree was rendered "and the sale made by consent, for the purpose of "clearing different tracts of land mentioned in the quit-claim deed, from certain encumbrances. The decree "was not adverse to the interest of complainant, but in "harmony with her interest. She is not attacking the "decree but claiming the enforcement of an agreement "under which it was rendered; and in our judgment "there is no ground for holding that the rights of com-

"plainant were cut off or in any manner impaired by
"the decree. "

Upon the last hearing before the Illinois Supreme Court on the appeal from the decree entered upon the accounting, this claim was urged and the Supreme Court presented its views as follows:

"It is said the suit is brought to review and set aside
"a decree of the United States Circuit Court and the
"bill is treated throughout the discussion as hostile
"to the foreclosure proceeding in that court, or as at-
"tempting to obtain relief properly available in that
"action. This is a misapprehension of the scope and
"purposes of the complainant's bill. In our former
"opinion we said: 'After the settlement had been
"concluded it turned out that certain encumbrances
"existed against some of the property which were sub-
"sequent to the trust deed, but which would take
"priority to the quitclaim deed executed by complain-
"ant and her husband; it therefore became necessary
"in order to obtain a perfect title to go on with the fore-
"closure proceedings, which was done.' This state-
"ment is based upon an allegation of the bill to the
"effect that it being represented to the complainant
"by the attorney of the company that it would be nec-
"essary to foreclose the trust deed in order to make
"good the title in the company to the lots. before they
"could take a mortgage thereon for the installments
"of redemption money, it was agreed between the parties
"that the agreement for redemption should not be exe-
"cuted until after the title had been perfected in the
"company by foreclosure, but in the meantime the
"plaintiff should execute and deliver to the company
"her quitclaim deed and should interpose no defense

"to such foreclosure. The allegation was found, in
 "the opinion above referred to, sustained by proofs
 "and is conclusive of that fact upon this appeal. The
 "foreclosure decree in the Federal court was therefore
 "as much the result of the agreement relied upon by
 "complainant as was the making of the quitclaim
 "deed by her. So far from this being an attempt to
 "review, modify or set aside the decree of the United
 "States Circuit Court, the right of action is predicated
 "in part at least upon it; whether the bill be called a
 "bill to redeem or given another name, can in no way
 "affect the question of jurisdiction in the state court.
 "The relief sought is the enforcement of a *contract* to
 "reconvey the property in question which we have al-
 "ready held the complainant entitled to." (149 Ill.,
 539; Pr. Rec., 516.)

As before stated it will be seen by reference to the bill that no attack was made upon the decree of the United States Court, nor was that decree or the deed pursuant thereto set up as a bar to the relief prayed. Referring to the assignment of error upon the appeal from the Appellate Court to the Supreme Court of Illinois, we find no claim that due credit and effect had not been given to the proceeding in the United States Court. (Pr. Rec., 303.) The questions at issue were purely and simply whether or not *as a matter of fact* such an agreement as was alleged in the bill was made, and if so, whether or not, *as a matter of law*, the defendant in error was entitled to a conveyance from plaintiff in error; and we fail to see that the plaintiff in error is in any better position, by reason of deriving its title in part under a decree of the United States Court, than it would have been if that title had been

derived by virtue of a patent from the government, or in any other manner. We see no reason why the fact that the title which it holds was derived in part by virtue of an authority exercised under the United States should in any manner absolve the plaintiff in error from the performance of its agreement, or that the enforcement of that agreement in any manner discredits the source of its title.

We had always supposed that a title acquired by such a decree might be disposed of the same as if acquired in any other manner; that it might be leased, mortgaged, sold, conveyed or devised the same as a title acquired by an ordinary deed, and a pre-existing agreement would apply to it in the same manner.

Here it is admitted that the company has the title. It acquired that title in part under the quitclaim deed of Mrs. Kirchoff and in part through the foreslosure proceedings in the United States Court; but in whole pursuant to the agreement that when it should be acquired it would be conveyed to the defendant in error. A bill to enforce that agreement is not one attacking that title.

In *Roby v. Colehour*, 146 U. S., 161, Roby while holding the title to certain property in which the Colehours were interested, went into bankruptcy and afterward purchased the property at a sale by his assignee. Some years later the Colehours brought suit against Roby to enforce the recognition of their interest in the property and to set aside a deed from William H. Colehour to Roby. Roby set up his own bankruptcy proceedings and claimed title from his assignee in bankruptcy. The case was decided against him and he appealed to the

Supreme Court of Illinois, which affirmed the decree of the lower court; upon which he prosecuted a writ of error from the Supreme Court of the United States to the state court, upon the ground that a title or right was claimed under an authority exercised under the United States by virtue of the bankruptcy proceedings. A motion was filed to dismiss the writ of error which this court denied but stated that the question was a close one.

The distinction between that case and this is that in that case there was no agreement as to Roby's purchase from his assignee in bankruptcy. If there had been an agreement that when he should have received title from the assignee he would convey to the Colehours and they had filed a bill to enforce that agreement, and the state court should have directed him to convey accordingly, then the case would have been like the one at bar. There it was claimed that he held the title to a part of the premises in trust and that as to that part nothing passed to the assignee in bankruptcy and that consequently the deed from the assignee conveyed no title to that part. Here nothing of the kind is claimed, but on the contrary it is admitted that the foreclosure proceeding and master's deed did clear the property of an intervening title and must be taken in connection with the deed from defendant in error to vest a good title to the premises in the company, and that title when so vested is not attacked, but it is claimed that the company holds it in trust for the defendant in error by virtue of the agreement which is sought to be enforced.

Upon the oral argument in this court on the previous

hearing, his Honor, Justice White, put to counsel for plaintiff in error this very pertinent inquiry: "If "this alleged agreement as claimed by the defendant in error had been reduced to writing, do you say "that its enforcement would then involve a question "of a Federal nature?" To which counsel responded in the negative. But how is the plaintiff in error in a better position before this court than it would have been in if the agreement had been reduced to writing? How does the character of the evidence upon which the agreement is established affect the jurisdiction of the court? The Supreme Court of the State of Illinois has found and stated all the material elements of the contract with as much certainty as if it had been reduced to writing between the parties. That finding is conclusive, and if the enforcement of a written agreement specifically stating the terms of such contract as claimed by the defendant in error in her bill would not involve a Federal question, then none is involved in this case.

We are curious to see whether counsel, in reply to this brief, will adhere to his former opinion that the enforcement of such a written agreement would not involve a Federal question; or, if he claim the privilege accorded to all wise men, of changing his mind, then we have a like desire to hear the reasons which he will assign for his new faith.

II.

THE APPLICATION FOR WRIT OF ASSISTANCE PLACED IN ISSUE ONLY THE RIGHT OF POSSESSION OF THE PREMISES AS BETWEEN JULIUS KIRCHOFF AND THE RECEIVER. THE RIGHTS OF THE PARTIES HERETO WERE IN NO MANNER AFFECTED BY THE ORDER ISSUED ON SAID APPLICATION.

If it should be contended that the decision of the Federal court upon the application for writ of assistance against the husband of defendant in error is a bar to the present action, it will be remembered that that application was made by the receiver appointed by the court to collect the rents. It was made fourteen months after the entry of the decree in that cause and over a year after the sale by the master. The report of sale had been filed just one year prior to the application and had been confirmed nine months prior thereto. An entire term of court had intervened between the entry of the decree, the sale by the master, and the report of the sale, and the application of the receiver. The master's report of sale was confirmed and the term of court at which that confirmation was made had expired. Under those circumstance we fail to see how the court could have set aside the decree or settled any of the rights of the parties upon the application. It had lost all jurisdiction of the case. It is true it might have refused the writ of assistance but the refusing or the granting of the writ could in no manner be an adjudication of the controversy between the parties to this suit.

The answer of Kirchoff was not filed with any intention of adjudicating in that case the rights of the parties, because unquestionably the court had no jurisdiction at that stage of the proceedings and in that form to pass on those rights. The answer was merely filed and the court asked not to issue the writ for fear that the rights of respondent would be prejudiced by its issuance. That it was not intended to litigate the facts in the case is evident from the answer itself which says that "said Kirchoff further states that his "solicitors have in course of preparation a bill in chancery setting up the foregoing facts and asking that "complainant be required to execute its undertakings "in the premises, or in default thereof that the decree "herein be set aside and held for naught." (Pr. Rec., 107.) It is quite probable that counsel at that time were inclined to the opinion that the proper draft of a bill would be asking the alternative relief as stated in the answer of Kirchoff to the petition; but it is evident that they subsequently concluded that the proper course was to wait until the company received its deed, as the defendant in error had agreed to do, and then ask that it be compelled to carry out its agreement.

The entire scope of the application for writ of assistance was to determine whether Kirchoff or the receiver was entitled to the possession of the premises. On that application the court might very properly say that the defendant in error could get no relief in that case and that the court would not undertake to determine who was in the right, but would by its receiver take possession of the premises itself, leaving her to her proper remedy by the bill which she was about to

file, and in the meantime, the court having possession of the premises neither party could be injured.

But it is sufficient to say that neither of the parties to this case was a party to the application for the writ of assistance; and the decision on that writ was against Julius Kirchoff only and not against defendant in error. (Pr. Rec., 192.) The defendant in error certainly can not be bound by a proceeding to which she was not a party.

"A judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive must have been made: 1, by a court of competent jurisdiction upon the same subject-matter; 2, between the same parties; 3, for the same purpose."

Aspden v. Nixson, 4 How., 467.

If the above rule be applied to the foreclosure proceedings, it will be seen that though they were between the same parties and upon the same subject-matter as the present suit, yet they were prosecuted for an entirely different purpose, namely, to cut off an intervening title; if applied to the application of the receiver for writ of assistance; it will appear that not only did the court have no jurisdiction in that proceeding, at that time, to determine the matters here involved, but neither the parties nor the purpose was the same.

III.

THE DEED FROM THE UNITED STATES EXECUTED BY THE COMMISSIONER OF INTERNAL REVENUE OPERATED MERELY AS A RELEASE OF ITS LIEN FOR TAXES UPON THE PREMISES AND NOT AS A TITLE. IT WAS NOT SET UP AS A DEFENSE AND THEREFORE CANNOT NOW BE URGED AGAINST THE DECREE.

As before stated, in 1871, while the premises were owned by defendant in error and occupied by the firm of Julius Kirchoff & Co., for a distillery, the premises were seized and sold by the United States because of failure of the distilling company to pay certain revenue taxes. The sale and deed were to the United States who conveyed all its interest to the plaintiff in error on September 10, 1884.

This deed was not set up by the plaintiff in error as a defense, but it appeared upon the accounting taken in the Circuit Court that such conveyance had been made and that the plaintiff in error had paid to the United States the sum of \$500 for a conveyance and in the accounting that amount was allowed plaintiff in error, together with interest from the date of payment. (Pr. Rec., 504.)

The plaintiff in error urged in the state court and we presume it will also be urged here, that the effect of the decree is to deprive it of this alleged title from the United States. No attack has been made upon that title nor was any defense made under it. The pleadings make no mention of it whatever. But it was claimed by the defendant in error that it operated as a release of the lien for taxes upon the premises

held by the United States and for that reason it was proper that the plaintiff in error should be reimbursed the amount which it had paid for such release. In this contention the state courts concurred.

It is necessary, in order to ascertain the extent of the interest or claim conveyed by the internal revenue commissioner, that we inquire into *the nature of the proceedings* and in furtherance of this inquiry we would respectfully refer the court to the case of *Mansfield v. Excelsior Refining Co.*, 135 U. S., 326, for a full and lucid discussion of the *identical* question involved. That case was appealed from the United States Circuit Court for the Northern district of Illinois, and the principal point at issue was the title acquired through the United States by virtue of a seizure in all respects identical with that in the present case. In that case this court held that by virtue of the revenue laws the United States acquired a first lien for revenue taxes upon the premises upon which the distillery was located; that this lien, *as against the owner of the premises, could be foreclosed only in a court of equity* and that the seizure and sale by the collector of internal revenue served to pass only the leasehold interest of the distilling company in the premises, and did not in any manner affect the title of the owner. Under the law therefore, the deed by the collector of internal revenue to the United States could and did pass only the interest of the distilling company of J. Kirchoff & Co. It expressly appears by the testimony of Kirchoff and, in fact, it is admitted by stipulation, that Mrs. Kirchoff was not a member of that distilling firm. (Pr. Rec., 498.) Therefore, as she was owner of the premises, her interest therein was

not affected in any manner by said deed to the United States government. It was wholly inoperative, except as affecting the interest of the firm which as to the land was nothing.

But the United States yet retained its lien upon the premises for the balance of the revenue taxes still remaining unsatisfied and in conveying all its interest to plaintiff in error, who was at the time of such conveyance a mortgagee in possession of the premises, it will be held to have released to plaintiff in error its lien upon the premises. For this release the company paid the sum of five hundred dollars (\$500), and in the accounting that amount together with interest thereon from the date of payment was allowed it. The United States retained its lien, not by virtue of that sale but because it had never been released until the insurance company, a mortgagee in possession of the premises, canceled the obligation by the payment of \$500.

"The taxes were a paramount lien to all others and "when paid by any lien holder he was of course sub- "rogated to the rights of the state (United States) for "the amount necessarily paid to extinguish the lien for "taxes."

Pratt v. Pratt, 96 Ill., 194.

But there is another reason why the plaintiff in error cannot complain that it is being deprived of this alleged title to the premises. The deed from the United States to the plaintiff in error was executed on September 15, 1884, nearly three years before the original decree was entered in the Circuit Court. Subsequent to the acquisition of said deed, the complainant filed an

amended bill in this case, to which the defendant had the right to file an answer and interpose as a defense to the relief prayed, its so-called independant title by virtue of said deed from the government; or the defendant could by a cross-bill or supplemental answer have interposed that defense, and it was its duty to do so, if it sought to make any claim thereunder.

Story's Eq. Plead., Sec. 393.

1 Van Fleet's Former Adj., 492.

The bill filed in this case was broad enough to warrant the court in entering a decree divesting the defendant of any title or interest which it may have had or claimed in the premises. It prayed that the defendant might be required to convey to the complainant the two lots in question. The Appellate Court directed the Circuit Court to enter a decree in accordance with said prayer, which was done. It cannot now complain that it has been deprived of a defense which it might have set up to this proceeding in the Circuit Court.

But the decision of the Supreme Court of Illinois is based as well upon the ground that the title under this deed from the United States was not presented as a defense in apt time to be available to the plaintiff in error as upon the ground that that deed did not effect the interest of Elizabeth Kirchoff in the premises.

Where there are two grounds for the judgment of a state court only one of which involves a Federal question and the other is broad enough to maintain the judgment sought to be reviewed, this court will not look into the Federal question.

Bacon v. Texas, 163 U. S., 207.

This decision by the Illinois Supreme Court that the deed from the government was not set up in time to avail the plaintiff in error as a defense, involved only a question of practice in the courts of Illinois and not a Federal question. As to questions of practice the decisions of the state court are not subject to review by this court.

Long Island Water Supply Co. v. Brooklyn
166 U. S., 685.

The decision of the state court on this question was clearly in harmony with established rules of practice in courts of chancery.

Story on Equity Pleadings, 393.

1 Van Fleet's Former Adj., 492.

I V .

IF IT SHOULD APPEAR THAT A FEDERAL QUESTION IS INVOLVED IN THIS CASE, THEN THE JUDGMENT OF THE ILLINOIS SUPREME COURT SHOULD BE AFFIRMED UNDER RULE 6 OF THIS COURT, AS NEEDING NO FURTHER ARGUMENT.

This case has been pending for over fifteen years. It has been twice to the Appellate Court of the State of Illinois, three times to the state Supreme Court and twice to this court. It has been argued both orally and by printed briefs. No less than eighteen printed briefs and five petitions for rehearing have been filed in the courts of appellate jurisdiction. It would seem that the object of plaintiff in error is to protract the litigation to the greatest extent possible.

It appears that the possibilities of procuring delay by bringing the case to this court did not occur to it until after the rights of the parties had been finally settled against it by the state Supreme Court, for then for the first time it sought to introduce the claim of a Federal question into the proceedings.

The judgment of the state Supreme Court to which the first writ of error was prosecuted from this court was rendered on June 12, 1890 (Pr. Rec., 305), and that writ of error was taken on June 10, 1892 (Pr. Rec., 316), it lacking only two days of two years from the date of judgment.

The last decision by the Supreme Court of Illinois was rendered on March 31, 1894 (Pr. Rec., 515), and this writ of error was taken on March 27, 1896 (Pr. Rec., 519) only four days prior to the expiration of two years from said judgment.

The case was argued both orally and by printed briefs in this court at the October term, 1895, and all questions subject to review by this court having been presented on these motions we think the case needs no further argument. It is clear according to the authorities of this court as well as of the Supreme Court of Illinois that the parties having made the agreement as found by the Illinois Supreme Court, it was proper for the state court to decree its enforcement whether a Federal question was involved or not. These parties bore the relation of mortgagor and mortgagee and it was intended by the agreement that that relation as to the premises in question should not be changed.

The defendant in error owes the plaintiff in error a sum of money and the plaintiff in error holds the title

to certain property which it was intended by both parties should belong to the defendant in error and should secure the plaintiff in error the amount of its claim. To that extent the relation of the parties is that of mortgagor and mortgagee.

The statute of the State of Illinois (Chap. 95, Sec. 12) provides that "every deed conveying real estate which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage." This statute has been in force in the State of Illinois in its present form for the last fifty years, and is only declaratory of the well settled rule applicable to courts of equity and always followed by the courts of that state.

This court has recognized the same rule in no uncertain terms. In *Peugh v. Davis*, 96 U. S., 332, the court said:

"It is an established doctrine that a court of equity will treat a deed absolute in form as a mortgage when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction, and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible."

Again in *Villa v. Rodrigue*, 79 U. S., 323, it is said:

"The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is char-

acterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things frank and fair, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. *The form of the instruments employed is immaterial.* That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals and the protection due to those whose property is thus involved require that such should be the law."

The general rule is stated by Pomeroy as follows:

"Whenever a person acquires the legal title to lands by means of a verbal promise to hold them for a certain specified purpose, as for example, a promise to convey them to a designated individual or to reconvey them to the grantor and the like; and having thus obtained the title, fraudulently retains, uses and claims the lands as absolutely his own so that the whole transaction by means of which the ownership was obtained is based upon deceit and is in fact

"a scheme of actual fraud, such party is regarded as holding the lands charged with an implied trust arising from his fraud and he will be compelled by a court of equity to execute this trust by performing his agreement and by conveying the estate in accordance with his promise."

Pomeroy on Specific Performance, 144.

Authorities might be multiplied indefinitely, but it would be useless to cite them as the rule is too well settled.

Assuming then that the agreement was made as alleged and as found by the state courts it is quite evident that the defendant in error was entitled to the relief granted.

Respectfully submitted.

GEORGE R. DALEY,

Solicitor for Defendant in Error.

WILLIAM S. HARBERT,

Of Counsel.

1st 155.

Brief of Wean & Prentice

Filed Oct. 11, 1897.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

No. 146.

UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR.

vs.
ELIZABETH KIRCHOFF.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

STATEMENT AND SUGGESTIONS ON BEHALF OF
PLAINTIFF IN ERROR IN OPPOSITION
TO MOTION TO DISMISS.

FRANK L. WEAN,
E. PARMALAN PRENTICE,
FOR PLAINTIFF IN ERROR.



IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1897.

No. 155.

UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

ELIZABETH KIRCHOFF.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

STATEMENT AND SUGGESTIONS ON BEHALF OF
PLAINTIFF IN ERROR IN OPPOSITION
TO MOTION TO DISMISS.

This case has been here before (160 U. S., 374), and in its main outline is one with which the members of the court are familiar.

The motion to dismiss the present writ of error on the ground that no Federal question is involved, comes to the second term after the allowance of the writ; after plaintiff in error has been to the expense of printing the full record, and on the eve, as it were, of argument, on the regular call of the docket.

The motion brings before the court every question in

the case, and for this reason it seems that if the motion be not denied, it should at least be reserved until the hearing of the case, that there may be opportunity for full presentation of these questions.

As it is impossible, under the rule, to argue the case fully at this time, it is our intention to do no more now than to show the existence of the questions which we desire, later to present to the court. In opposing the present motion, however, we are compelled to make a short statement of the principal points involved in the case.

STATEMENT.

Stated in the briefest possible form, the complainant's bill prays to redeem certain real estate in Chicago from a mortgage which had been foreclosed in the United States Court, sometime before the institution of the present suit, and this is the relief which the State courts have granted.

It is our contention that this proceeding in the State court constitutes, in effect, an attack upon the foreclosure decree of the United States Court, and if this contention be sustained, then, of course, a Federal question is involved in this case.

The ground upon which the complainant rests her right to the so called redemption, is a supposed verbal agreement, which complainant insists that the Insurance Company made with her in 1878, soon after its foreclosure bill had been filed in the United States Circuit Court for the Northern District of Illinois.

As stated in her bill, the supposed agreement was, in substance, that the Insurance Company would proceed with its foreclosure suit to completion, and take the title of all the mortgaged property, and would then, after its title had been perfected, convey a certain portion of the land to Mrs. Kirchoff, upon the consideration of the payment of \$10,000 in installments of \$1,000 a year.

The purpose of this agreement, as stated in complainant's bill, so far as it relates to the foreclosure suit, was to free the land from the lien of certain judgments against the Kirchoffs. (Pr. Rec., 24.)

It is alleged, in substance, that while the foreclosure

was to be effectual as against junior incumbrancers of the Kirchoffs, it was nevertheless to be wholly ineffectual, so far as it concerned the mortgagors or mortgagee; the decree of the United States Court being used as an instrument, not of foreclosure between the principal parties, but merely to relieve the property of the Kirchoffs from the burden of their debts.

The contention on the part of the defendant in error has been that, notwithstanding the foreclosure in the Federal court and the deeds issued to the Insurance Company thereunder, she was still entitled to a mortgagor's interest in the land, by reason of the alleged agreement, which interest, it is claimed, was not cut off by the foreclosure decree, although the agreement was claimed to have existed long before such decree was entered.

On the other hand, it has been insisted by the plaintiff in error, that the foreclosure proceedings were all they purported on their face to be, and that the decree in the Federal court cut off, not only all the rights and interests of junior incumbrancers, but also every interest of the defendants in that suit, and of all persons claiming through or under them, except, in so far as those rights were preserved by the statute providing for redemption.

It is not denied on the part of the Insurance Company, that there was some negotiation between its agents in Chicago and the Kirchoffs, looking toward a settlement of the foreclosure suit, and that in the course of these dealings, on or about the 11th of September, 1879, deeds were given to the agents of the Insurance Company in Chicago, by Mrs. Diversey, who owned part of the mortgaged property, and by the Kirchoffs.

The arrangements with Mrs. Diversey are matters into

which we need not go at this time. It is sufficient to say that the deed from Mrs. Diversey to the Insurance Company, was one which the agents of the company in Chicago had been authorized to accept. (Rec., 289, 149.) It was, therefore, immediately placed upon record. (Rec., 149.)

The deed from the Kirchoffs, which was delivered at the same time, was withheld from record (Rec., 149), for the reason that in the negotiation between the Kirchoffs and Kendall and Warfield, the agents of the Insurance Company, no terms of adjustment had been reached, sufficiently definite to submit to the company. (Rec., 149, 158.)

It was not until the 1st of November, 1879, that a definite proposition was made to the company's agents, and by them submitted by letter to the Insurance Company in Boston. (Rec., 130, 222, 176.) The answer to this letter was written on the 5th of November, 1879, and unequivocally declined the proposition. (Rec., 273; Exhibit 144.) This refusal was at once communicated to the Kirchoffs. (Rec., 152, 159.)

The proposition having been declined, Kendall either tendered back the quitclaim deed to Kirchoff, or gave him opportunity to withdraw it (Rec., 159), and in doing this he was only carrying out the original purpose in withholding the deed from record, until the home office had been heard from.

The Kirchoffs refused to receive the deed which was thus offered to them (Rec., 159), preferring to take their chances of enforcing the so-called agreement, notwithstanding its rejection by the home office.

After this Kendall went on with the foreclosure pro-

ceedings. Kirchoff took a lease from the receiver of the property which he and Mrs. Kirchoff then occupied.

Under the terms of the alleged agreement with the Insurance Company, any rent which might have been paid by Kirchoff during his occupancy of this property would have been applied upon redemption money. In the lease as executed, no such provision in regard to rent was contained. (Rec., 97.)

In January, 1880, the Insurance Company amended its foreclosure bill by adding new parties defendant, and notice thereof was served on the Kirchoffs about the 17th of that month. (Rec., 193, 112.) In July, testimony was taken before the Master, and on the 30th of August, nearly a year after the rejection of the Kirchoffs' offer of settlement, a decree was entered, confirming the report of the Master and ordering a sale of the property. (Rec., 192, 193.)

The sale took place on the 20th of October, 1880, and the property was bought by the Insurance Company in parcels, for an aggregate amount of \$92,000, being \$1,000 less than the indebtedness. The two lots, of which a reconveyance at the aggregate price of \$10,000 is sought in this suit, were bid in for the total sum of \$17,000. (Rec., 193.)

In October 1881, the receiver filed a petition in the United States Court, showing that the Kirchoffs had refused to pay rent, and asking a writ of assistance to give him possession of the property. (Rec., 192.)

To this petition Mrs. Kirchoff, by her husband and agent, filed an answer, setting up the very agreement which is set up in the present suit; that the possession was asked in violation of the agreement, and stating

further that solicitors for the Kirchoffs have in preparation a bill in chancery setting up this agreement, and asking that complainant be required "to execute its undertakings in the premises, or in default thereof, that the decree herein be set aside and held for naught." (Rec., 24, 106, 107.)

Upon this question the decision of the United Circuit Court was against the Kirchoffs. The writ of assistance issued and the Kirchoffs were ejected. (Rec., 192.)

After this, the complainant took no further steps to assert her rights until the Master's deed had been delivered to the Insurance Company, and the proceeding in the United States Court was finally ended.

When the foreclosure was completed and after the Master's deeds for the mortgaged property had been delivered in accordance with the decree of the United States Court, the complainant filed her present bill in the Circuit Court of Cook County.

THE RECORD.

The bill of complaint filed in the State court set out the foreclosure proceeding in the United States Court, and alleged that the Insurance Company, by virtue of this proceeding, claimed absolute title to the property in question: that in fact its title was not absolute, but was subject to an equitable interest in Mrs. Kirchoff, which interest was to be measured by the provisions of the agreement claimed. The prayer was, therefore, "that the complainant may be allowed to redeem said premises according to the terms of said agreement." (Rec., 25.)

To this bill the Insurance Company demurred, and the demurrer raised the question of the jurisdiction of a State

court to permit redemption from a mortgage which had already been foreclosed in a Federal court.

The demurrer was overruled, and the defendant thereupon answered, reserving a demurrer in its answer. The case was referred to a Master, and evidence was introduced at the hearing, of the whole foreclosure proceeding in the United States Circuit Court, and of the proceedings upon the Receiver's petition for a writ of assistance. (Rec., 191-193, 406.)

Upon pleadings and proofs the bill was dismissed for want of equity. (Rec., 30.)

This decree of dismissal was, however, reversed by the Appellate Court (33 Ill. App., 607; Rec., 317, 301), and this reversal was approved by the Supreme Court of Illinois. (133 Ill., 368; Rec., 305.)

It should be noticed, however, in view of the effort of counsel for defendant in error to treat the bill in this court as a bill for specific performance of a contract for conveyance of real estate, and not as a bill for redemption, that both the Appellate and Supreme Courts of Illinois expressly considered the bill as a bill for redemption, and not as a bill for specific performance. In the opinion of the Supreme Court, after discussing the evidence, and holding that the agreement claimed was one for redemption, the court said:

"We have said nothing in reference to the argument that this is a bill for specific performance, and hence falling within the Statute of Frauds, as we do not regard it as a bill of that character." (133 Ill., 368, 380; Rec., 311.)

In passing upon the question which the record presented as to the jurisdiction of the State court to review the decree of the Federal court, the Supreme Court of Illinois said:

"It is also claimed that complainant's failure to assert the alleged agreement in the foreclosure proceedings is a bar to its assertion here, and that the proceedings in the foreclosure are conclusive. We are unable to concur in this position. It was a part of the arrangement under which the complainant was to obtain the two lots in controversy that a decree of foreclosure should be entered and that the premises should be sold under such a decree. The decree was rendered and the sale made by consent for the purpose of clearing the different tracts of land mentioned in the quitclaim deed from certain incumbrances. The decree was not adverse to the interest of complainant, but in harmony with her interest; she is not attacking the decree, but claiming the enforcement of an agreement under which it was rendered, and in our judgment there is no ground for holding that the rights of complainant were cut off or in any manner impaired by the decree." (Rec., 311.)

In its opinion on the last appeal, the Supreme Court of Illinois held that "the merits of the case were settled adversely to the company" by its former opinion, to which reference has just been made, and so far as the Federal question is concerned the last opinion was merely an affirmation of the former. (Rec., 516.)

It therefore clearly appears:

First. That the bill in this case recited the foreclosure proceedings in the United States Court and alleged that defendant claimed to hold an absolute title to the lots in question, by virtue of these proceedings and of the Master's deeds obtained thereby. (A title claimed under an authority exercised under the United States.)

Second. That the defendant answered reserving the advantage of a demurrer, and admitting and averring the claim of absolute title under the Federal decree and deeds.

Third. That the defendant introduced in evidence the record and decree of the Federal court in support of the title thereby claimed.

Fourth. That a Federal question was thereby raised on the record in the State court by the pleadings and proof.

Fifth. That any decision of the case necessarily involved passing on this claim of title, and the decision of the question thus raised.

Sixth. That the opinion of the Supreme Court of Illinois shows that the question was actually passed upon by that court.

Seventh. That the necessary effect of the decree and judgment of the State court was against the right and title claimed by the defendant under Federal authority.

The present writ of error is thus brought, not only within the letter, but also within the spirit of section 709 of the Revised Statutes, as that section has been construed and applied in many cases by this court :

Dupasseur v. Rochereau, 21 Wall., 130.

Embry v. Palmer, 107 U. S., 3.

Factor's Ins. Co. v. Murphy, 111 U. S., 738.

Crescent Co. v. Butchers' Union Co., 120 U. S., 141.

Crowell v. Randall, 10 Peters, 368.

Murray v. Charleston, 6 Otto, 432.

Murdock v. City of Memphis, 20 Wall., 590.

Roby v. Colehour, 146 U. S., 153.

Dowell v. Applegate, 152 U. S., 327.

Stanley v. Schwalby, 162 U. S., 255.

SUGGESTIONS.

I.

THIS IS A BILL TO REDEEM FROM A MORTGAGE WHICH HAD BEEN PREVIOUSLY FORECLOSED IN THE FEDERAL COURT. SUCH A BILL IS NECESSARILY A BILL TO REVIEW THE FORECLOSURE DECREE AND RAISES A FEDERAL QUESTION.

The present case is, we believe, controlled by the case of *Randall v. Howard*, 2 Black, 585. That was a bill filed in the Circuit Court of the United States for the District of Maryland, and sought relief from a foreclosure decree rendered by a court of that State. The ground for the relief asked was an alleged agreement, made before the decree in the State court, similar to the agreement, which is claimed in the case at bar, that the foreclosure should be proceeded with in pursuance of a "friendly arrangement," that the property should be bought by the complainant in the foreclosure suit and held by him, ostensibly for himself, but really as security for the indebtedness determined by the decree. The bill charged that having obtained an apparent title, the defendant fraudulently determined to act as if he was the real owner, and was claiming a right to sell, and that the defendant in furtherance of his object, had by process, through the sheriff of the State court, dispossessed the complainant. The prayer of the bill was to restrain the defendant from disposing of the lands and for the sale of so much as might be necessary to pay off the defendant, according to the understanding prior to the sale, and that the residue of the lands be conveyed to the complainant.

It was claimed in that case as in the case at bar,

that the decree was entered by consent and in pursuance of a "friendly arrangement," or, as it has been stated in the case at bar, that "the decree was not adverse to the interest of the complainant, but in harmony with her interest; she was not attacking the decree, but claiming the enforcement of an agreement under which it was entered."

It was held by this court that the bill in that case was one of which the United States court had no jurisdiction. In passing upon this subject this court said:

"The bill in this case brings in review various matters passed on in the progress of a suit by the Cecil County Circuit Court, a court of general jurisdiction, having complete control of the parties and of the subject-matter of controversy.

It seeks to annul the sale of lands made by virtue of a decree of the Cecil County Court, sitting as a court of equity in a case pending between these same parties, to affect the distribution of the proceeds of the sale; to enjoin the defendant from making any disposition of the lands purchased by him; to disturb his possession; to invalidate his title, and to have the mortgaged property resold.

This is a direct and positive interference with the rightful authority of the State Court."

It seems there is no escape for defendant in error from the effect of this decision. The present case is "upon all fours" with the case to which reference is made. The decision was upon the very matter which is here presented, and supports the contention which the Insurance Company has made throughout this litigation. To the same effect, see, also, *Nougué v. Clapp*, 101 U. S., 551.

Aside from the authorities bearing upon the question, we believe that upon such facts as those involved in the present suit no other logical conclusion can be reached than that which was reached in the case of *Randall v. Howard*.

The only legal impediment in the way of redemption is the decree of foreclosure rendered in the United States Court, and the question presented by the present bill is, therefore, nothing else than the question, whether the mortgage upon the two lots now in controversy, was ever actually foreclosed. Did the Federal decree operate as a foreclosure of Mrs. Kirchoff's right of redemption?

What does a decree of foreclosure cut off if it does not cut off all preceding contracts with a mortgagor respecting the premises mortgaged? Can a mortgagor, summoned into court, hold back, even by mutual agreement, any of his claims on the premises involved? Can he carve out of the proceedings certain interests and contract rights, and allowing a decree to go against him in its widest scope, be sure that those rights will afterwards find specific enforcement?

What does a foreclosure suit determine if it does not determine all questions involved in a subsequent proceeding for a redemption from the same incumbrance?

"The right of redemption is barred by a valid foreclosure to which the party claiming the right was made a party. This proposition is elementary and is supported by all the authorities."

American and English Encyclopedia of Law, Vol. 20, page 626.

A foreclosure suit is a suit for an accounting between a mortgagor and mortgagee, in which a decree is sought which shall fix a limit to the mortgagor's right of redemption. These are the two salient features of a foreclosure suit: the accounting, and the limit which is placed by the decree upon the period of redemption. They exist in every suit for foreclosure of a mortgage.

A bill for redemption from a mortgage is a bill which

seeks precisely the same relief, except that it is filed by the mortgagor instead of the mortgagee. It seeks an accounting and it seeks to have a definite period fixed in which the mortgagor may redeem.

It will be seen, therefore, that the ground covered by the two suits is precisely identical. The subject-matter litigated in each case is the same. The decision of the court is upon the same rights. More than this, if the mortgagor who has brought a bill to redeem, fails to pay the amount due within the time ordered, and the mortgagee obtains judgment for costs, the mortgage is by that very fact foreclosed. The decree of dismissal with costs of a bill for redemption is itself equivalent to a decree of foreclosure, and has this effect, although it does not expressly declare it.

Stevens v. Miner, 110 Mass., 57.

Bolles v. Duff, 43 N. Y., 469.

Smith v. Bailey, 10 Vt., 163.

Shannon v. Spears, 2 A. K. Marsh (Ky.),
311.

Beach v. Cook, 28 N. Y., 508, 535.

Perrine v. Bunn, 4 Johns. Ch., 140.

Sherwood v. Hooker, 1 Barb. Ch., 650.

Adams v. Cameron, 40 Mich., 506.

Such a decree necessarily reviews a previous foreclosure decree. In the present case the decree of the State court reviews a previous Federal foreclosure decree and this relief it was beyond the jurisdiction of the State court to grant.

II.

THE COMPLAINANT'S BILL ATTACKS THE FEDERAL DECREE OF FORECLOSURE ON GROUNDS WHICH, IF TRUE, WOULD AVOID THAT DECREE AS AGAINST ALL PARTIES.

The first and conspicuous feature of complainant's case, apparent upon the first reading of her bill, is the absolute illegality and immorality which permeates the alleged arrangement which complainant seeks to set up.

The agreement which she seeks to enforce was nothing less than that the Insurance Company should proceed with its foreclosure in the United States Court, for the benefit of the debtors, and hold the title, when acquired, in trust for them, to free the land from judgment liens of their creditors.

The relation of mortgagor and mortgagee which subsisted between the Insurance Company and the Kirchoffs, at the beginning of the foreclosure suit, was to exist between them at its close, unaffected in any material particular. As between them, the controversy was to be apparent, not real. The whole proceedings were to be limited in their effect, so as to operate only against junior incumbrancers, and this limitation was to be imposed upon the Federal decree by an agreement, between the Kirchoffs and the Insurance Company, made, if made at all, more than a year before the decree was entered.

If we assume the truth of the statements contained in complainant's bill (Rec., 24), she has stated nothing more than that she was a party to a conspiracy, the purpose of which was to impose upon the United States Circuit Court and use its decree merely as a means of perpetrating a fraud.

This phase of the case received considerable attention in the case of *Randall v. Howard*, to which reference has been made. In passing upon the character of such an agreement, this court, speaking by Mr. Justice DAVIS, and after quoting the allegations of complainant's bill, which in that case were substantially the same as those at bar, said :

"These allegations, stripped of their indefiniteness and vagueness, mean simply this: That the parties to this bill, in order to counteract a claim set up by other parties for a portion of the mortgaged lands, combined together, through the aid of the court, to shorten the time of sale, and to cover up the real ownership of the property.

"A fraudulent agreement was entered into, to defeat, as is charged, 'a fraud attempted against the complainants.' If the claim set up was a fraud on the rights of the complainants, does that consideration change the character of the agreement which was made to defeat that fraud? Manifestly not. The whole complaint of the bill is that the defendant will not execute the agreement thus fraudulently made, and the object of the bill is to compel him to do it.

"A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim '*in pari delicto delicto potior est conditio defendentis*' must prevail.

"It is against the policy of the law to enable either party in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another. Story's Equity, Vol. 1, Sec. 298; *Balt v. Rogers* (2 Paige, 156); *Wilson v. Watts* (9 Gill, 356)."

See, also,

Connelly v. Cunningham, 5 Pacific Reporter, 473.

Frisby v. Withers, 61 Texas, 134.

The decree of the State courts in the present case would, therefore, if sustained, have the effect of annulling

the Federal foreclosure decree as against all parties to that suit. The agreement stated in complainant's bill, that the foreclosure should be complete so as to cut off the rights of her judgment creditors, but not so as to affect her rights, would be a fraud upon creditors, and cannot be enforced. The decree must stand as a whole, or fall as a whole.

The action of the State courts in setting it aside, as to Mrs. Kirchoff, amounts, therefore, to nothing less than setting it aside as to all parties and leaving all matters heretofore established by Federal decree open for future adjustment, save as they have been settled by the decree of the State courts in the present suit.

III.

THERE IS NO FINDING OF FACT MADE BY THE STATE COURT IN THIS CASE, WHICH WOULD ENABLE THAT COURT TO DECIDE THE CASE, WITHOUT PASSING UPON THE FEDERAL QUESTION.

We have already shown that it was the intention of the Kirchoffs' solicitors, in drafting the present bill, to make a direct attack upon the Federal decree. The answer filed to the receiver's petition for a writ of assistance, by Mrs. Kirchoff, through her husband, Julius Kirchoff, in the United States Court, asked that that court should take no action in the premises, and as one of the reasons for delay, stated that Mrs. Kirchoff's solicitors "have in course of preparation a bill in chancery setting up" the facts stated in the present bill, "and asking that complainant be required to execute its undertakings in the premises, or in default thereof that the decree herein be set aside and held for naught." (Rec., 106.)

The intention of the solicitors for defendant in error was therefore, confessedly, to make an attack upon the Federal decree.

It is their present contention, however, that their bill does not disturb the foreclosure proceedings in the Federal Court, but merely prays for a conveyance by the Insurance Company, pursuant to the agreement.

It is said by counsel for defendant in error that "the questions at issue in the State court were purely and simply, whether or not, *as a matter of fact*, such an agreement as was alleged in the bill was made, and if so, whether or not, *as a matter of law*, the defendant in error was entitled to a conveyance from the plaintiff in error." (Brief, p. 17.)

It is argued that the State courts of Illinois have found, as a matter of fact, that the agreement alleged in the bill was made. This finding, counsel say, the Supreme Court of the United States has no power to review, and if it be accepted, it is insisted must be conclusive of the case.

Of course, the Insurance Company denies the contract, and it is believed that the evidence shows that the judgment of the Circuit Court of the United States upon the receiver's petition was correct, and that the findings of the State courts are not supported by the evidence.

Without stopping, however, to discuss this question, we admit that this court has often held, at least in actions at law, that it has no jurisdiction "to review the decision of the highest court of a state upon a *pure question of fact*."

Israel v. Arthur, 152 U. S., 355.

The findings of the State courts, however, upon questions of law, are not conclusive upon this court, and it

makes no difference whether the question of law arises upon the evidence or not.

Thus, in *Dushane v. Beall*, 161 U. S., 513, the court held that “*If all the facts stated in the record before us do not, as a matter of law, warrant the conclusion at which the highest court of the State arrived upon the question, it is the duty of this court so to declare, and to render judgment accordingly.*” To the same effect was the case of *Stanley v. Schwalby*, 162 U. S., 255, where the court, in considering whether the purchaser of a title took it with notice of an existing defect, said :

“*The evidence appears to us wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan, or any knowledge of the circumstances tending to prove the existence of such a deed, that he should have considered and treated them as of any weight, or have reported them to the authorities at Washington. The inevitable conclusion, as matter of law, is that the United States acquired a good and valid title, as innocent purchasers, for a valuable consideration, and without notice of a previous conveyance to McMillan.*”

In the decisions of the State courts in the present case, no findings of fact were made in the decrees which have been entered, but upon turning to the opinions which have been rendered in the case, to ascertain what the conclusions of the court were, we find that the courts have decided that the Insurance Company, in 1878, entered into the contract claimed in the bill.

Union Mutual Life Insurance Co. v. Kirchoff, 133 Ill., 368 ; Rec., 305.

There are involved in this finding, some questions of law which will not be discussed here. For our present purpose, it will be sufficient to call attention to the un-

disputed fact, that the Insurance Company absolutely and unequivocally repudiated this contract in 1879, and notified the Kirchoffs that it recognized no such agreement. (Rec., 273, 159, 152.) The proposition having been declined, Kendall either tendered back to Kirchoff the quitclaim deed, or gave him an opportunity to withdraw it. (Rec., 159.) Kirchoff, however, refused to accept the deed. (Rec., 159.)

After this the Insurance Company went on with the foreclosure proceedings. In January, 1880, the bill was amended by adding new parties defendant, of which the Kirchoffs had notice. (Rec., 159.) In July testimony was taken before the Master, and on the 30th of August, ten months after the Insurance Company had notified Kirchoff that it denied the existence of the so-called agreement, the foreclosure decree was entered, confirming the report of the Master, and ordering sale of the premises. The sale took place on the 20th of October, 1880, and the property was bought in parcels by the Insurance Company; the two lots which it is sought to "redeem" in the present case for the sum of \$10,000, being purchased by the Insurance Company for \$17,000.

We cannot emphasize too strongly the fact that even accepting the finding of the State courts, that the Insurance Company in 1878, made the contract claimed, it is nevertheless true,

- a. That the Insurance Company repudiated the agreement on the 5th of November, 1879, and immediately notified Kirchoff that it would go no further with it; and
- b. The State courts have made no reference to the fact, nor any findings upon this subject.

The question of law that is presented is, therefore, this;

What effect is to be given to the action of the Insurance Company in repudiating this contract and giving the Kirchoffs' notice of its refusal to be bound by it?

The State courts have, it is true, found that the Federal foreclosure decree "was rendered and the sale made by consent for the purpose of clearing the different tracts of land, mentioned in the quitclaim deed, from certain incumbrances. (*Insurance Company v. Kirchoff*, 133 Ill., 368, 380; Rec., 311.) The question whether consent was ever given may be a question of fact, but the question as to the right of the Insurance Company to withdraw that consent, and as to the effect of its action when it did withdraw its consent, taken in connection with the foreclosure proceedings, are questions of law, and these are among the questions upon which we desire to be heard in this case.

It is quite clear that in course of foreclosure in the United States court a dispute arose between the Insurance Company and the Kirchoffs as to whether any adjustment of the matters at issue between them had been made; the Kirchoffs on the one hand claiming the existence of a contract, and the Insurance Company, on the other hand, denying that any contract had been made, and refusing to perform obligations which it insisted it had not assumed.

Under these circumstances there must have been some course open to the Insurance Company by which this dispute could be adjudicated. The matters in dispute were the very matters involved in the Federal foreclosure suit, and concerned the title which was to be derived through foreclosure sale, the terms upon which the redemption was to be allowed and the parties against whom the decree was to operate. The Insurance Company claimed

the right to have the property sold at foreclosure sale, free from any interest of the Kirchoffs, and it claimed the right to limit redemption by the mortgagors to the statutory period.

The Kirchoffs knew that the Insurance Company denied the existence of any agreement between them, but for nearly a year they lay by and asserted no claim under this so-called agreement, while the Insurance Company prosecuted its hostile foreclosure.

The Kirchoffs knew that if the contract was a lawful contract for legitimate purposes such as a court could approve, it could have been embodied in the foreclosure decree. The very act of applying for and procuring the entry of a decree, inconsistent with the agreement, was an adverse, hostile act, and was the fitting termination of a year of hostile foreclosure proceedings.

It is the argument of counsel for defendant in error that "the perfecting title by the foreclosure proceedings was part of the agreement," (Brief, p. 11) and it is argued that the agreement claimed would not have operated as a defense to the entry of a foreclosure decree, for the reason that the agreement contemplated the entry of such a decree.

A sufficient answer to this is, that the agreement did not contemplate the entry of such a decree as was actually entered. The agreement would not have been a defense in the foreclosure proceeding, in the sense that it would have prevented *any* decree of foreclosure from being entered, but if the agreement was a lawful one, it would have been a defense against the entry of any decree which would give to the Insurance Company rights, which were inconsistent with its rights under the agreement.

Of course, assuming that the agreement was actually made, it is very easy to see why it could not have been brought forward to the court or embodied in the decree. The benefit which Mrs. Kirchoff expected to derive from the foreclosure, as disclosed by the bill, was, that she would get her property out of the way of her creditors without injury to herself.

If, therefore, she could have found any court sufficiently complaisant to lend its records to such a purpose, its compliance would have been ineffectual, for a statement in the decree of an interest remaining in Mrs. Kirchoff would have exposed this interest to the rights of her creditors and have defeated the very purpose sought.

We have touched upon this subject elsewhere. The fact to be noted here is that the Kirchoffs did keep silence about their supposed agreement for at least a year. They let a decree go against them which was inconsistent with the rights which they are now claiming; they waited until the period of redemption allowed by the decree had expired, and until the deed had been delivered to the Insurance Company, and then they set up in another forum the claims that they could have presented, but did not present, to the United States Court

There can be no doubt that a decree of a court of competent jurisdiction is binding upon all parties to the proceeding in which it was entered, as to all matters actually determined, and as to all other matters which might have been raised and determined in the case.

A person having a good defense is not permitted when sued, to keep silence, let a judgment go against him, and then raise his defense in some other proceeding or in some other forum.

It follows, therefore, that as soon as the Insurance Company repudiated Kirchoff's claim on the 5th of November, 1879, it was then complainant's duty to at once set up her rights in the foreclosure proceedings, if she had any, and failing to do so, she is estopped by the Federal decree from now setting up in the State courts, claims which existed before the entry of that decree.

That the Federal decree is, under such circumstances, conclusive and binding, is, we believe, established by the following cases :

Dowell v. Applegate, 152 U. S., 327.

Nogué v. Clapp, 101 U. S., 551.

Jones v. Vert, 121 Ind., 140.

May v. Coleman, 81 Ala., 325.

Speck v. Pullman Co., 121 Ill., 33.

In *Mally v. Mally*, 52 Ia., 654, we find a case very similar to the one at bar.

In that case the plaintiffs brought an action for the possession of certain real estate, title to which they had obtained under the foreclosure of a mortgage. In defense of the proceeding the defendants, who had been the mortgagors, set up a written contract which they alleged had been made with the mortgagee prior to the foreclosure. This contract provided for a life lease on a portion of the land in question, to Christine Mally, one of the defendants and the wife of the other defendant, and in it other concessions appeared to have been made by the mortgagee for the benefit of the mortgagors. It appeared that these claims were not set up in the original foreclosure proceedings until after the judgment of the court was announced. Judgment of foreclosure was entered against the defendants, the property was bid in by the

mortgagee and deeds regularly issued as in the case at bar. The action above referred to was then brought, by the parties holding sheriff's deeds, for possession. Judgment was rendered for the plaintiffs and the defendants appealed. The Supreme Court of Iowa in its opinion in this case says:

"The defendant insists that the plaintiffs are not entitled to the immediate possession of the property because of the provisions of the written contracts set out in the answer and the amendment thereto. The plaintiffs in the foreclosure suit prayed for an unconditional foreclosure of the mortgage. *The decree rendered is an absolute one*, accompanied with the usual incidents, and to be followed by the usual consequences of an absolute foreclosure. It authorized a sale, to be followed, in the absence of redemption, by sheriff's deed, entitling the purchaser to immediate possession. Such a sale has been made, and such a deed has been executed. *If any facts existed at the time of the foreclosure, under which the plaintiffs would not have been entitled to an absolute decree of foreclosure, these facts constituted pro tanto a defense to the plaintiff's action*, and should have been pleaded as such in the foreclosure proceeding. These written contracts constituted such partial defense, or they did not. If they constituted such partial defense, they should have been set up and relied upon in the foreclosure proceeding, and cannot be made available now. *Hackworth v. Zolters*, 30 Iowa, 433; *Dewey v. Peck*, 33 Iowa, 242; *Lawrence Savings Bank v. Stevens*, 46 Iowa, 429; *Collins v. Chantland*, 48 Iowa, 242.

If these contracts did not then evidence a condition of things which would have prevented an absolute foreclosure, they cannot now be set up to deprive the plaintiffs of the benefits of the absolute foreclosure which they have obtained.

The defendants did offer to set up the contract set out in the original petition as a defense in the foreclosure proceedings, but not until after the court had announced its judgment in the case. The court refused to allow the amendment as coming too late. It was clearly within the judicial discretion of the court to refuse to allow the

amendment under the circumstances disclosed ; *and if it were not, the decision of the court, not having been appealed from, is conclusive upon the defendants.* In any view of the case the written agreements do not now constitute a defense to the plaintiffs' action."

IV.

THE DECISION OF THE UNITED STATES COURT UPON THE APPLICATION FOR A WRIT OF ASSISTANCE IS CONCLUSIVE OF THE PRESENT CASE.

The matter presented to the Federal court upon the hearing of the receiver's petition was precisely the question which was litigated in the State courts of Illinois—as to whether the Insurance Company had made the agreement claimed, and what effect, if any, should be given to that agreement. In Kirchoff's answer to the receiver's petition, which the present bill alleges to have been Mrs. Kirchoff's answer, he set up every claim made in the present suit. It is true that all the receiver asked for, was that possession of the property be delivered to him, but the question of possession involved the question as to the existence of the agreement under which the Kirchoff's claimed. That question of fact was therefore presented to the court, and was necessarily passed upon by the court.

It is argued by counsel (Brief, p. 12) that at this time the United States Court had lost all jurisdiction of the case, but under the decisions of this court such an objection can have no foundation, for the property was still in the hands of the receiver of the United States Circuit Court, and "nothing can be plainer than that any litiga-

tion for its possession must take place in that court without regard to the citizenship of the parties."

Mina. Co. v. St. Paul Co., 11 Wallace, 632.

Freeman v. Howe, 24 Howard, 450.

Randall v. Howard, 2 Black, 585.

The argument that this judgment was not conclusive in the present proceeding because, as counsel for defendant in error say, "Neither of the parties to this case was a party to that proceeding" (Brief, 12), is equally without foundation. It is true that the answer to the receiver's petition was signed by Julius Kirchoff, but it is also true that the bill of complaint in the present case alleges in terms:

"That thereupon *your oratrix*, through her said husband, resisted said application for said writ of assistance, and set up as defense to the application of said receiver, an answer setting forth in substance the aforesaid agreement between *said Company* and your oratrix, but *said Company*, through its solicitors employed in said suit, supported the application of said receiver, and wholly disregarded its agreement with your oratrix, and procured the order of said court for the assistance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead."

V.

THE FEDERAL QUESTION IS CONTROLLING.

It follows from what has been said, that the ground covered in the present case was completely covered by the previous decrees of the Federal court. Every claim presented to the State court in this suit had already been

before the Federal court in the foreclosure suit. The larger issue of whether the Insurance Company in that suit had the right to the foreclosure of its mortgage as against all the rights of all the defendants to the suit, in that property, included every issue that could be made in the present case, and when the State court undertook to grant relief to the complainant in this suit, it failed to give the Federal decree the effect to which it is entitled, and we submit that this is the controlling question in the present case.

FRANK L. WEAN,

E. PARMALEE PRENTICE,

For Plaintiff in Error.

1885

JAMES H. MCKINLEY

Brief of Union Mutual Insurance Co.

Term 1885, 1887
Supreme Court of the United States

COMBINED TERM, A. D. 1887

No. 100

UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR.

ELIZABETH KIRCHOFF.

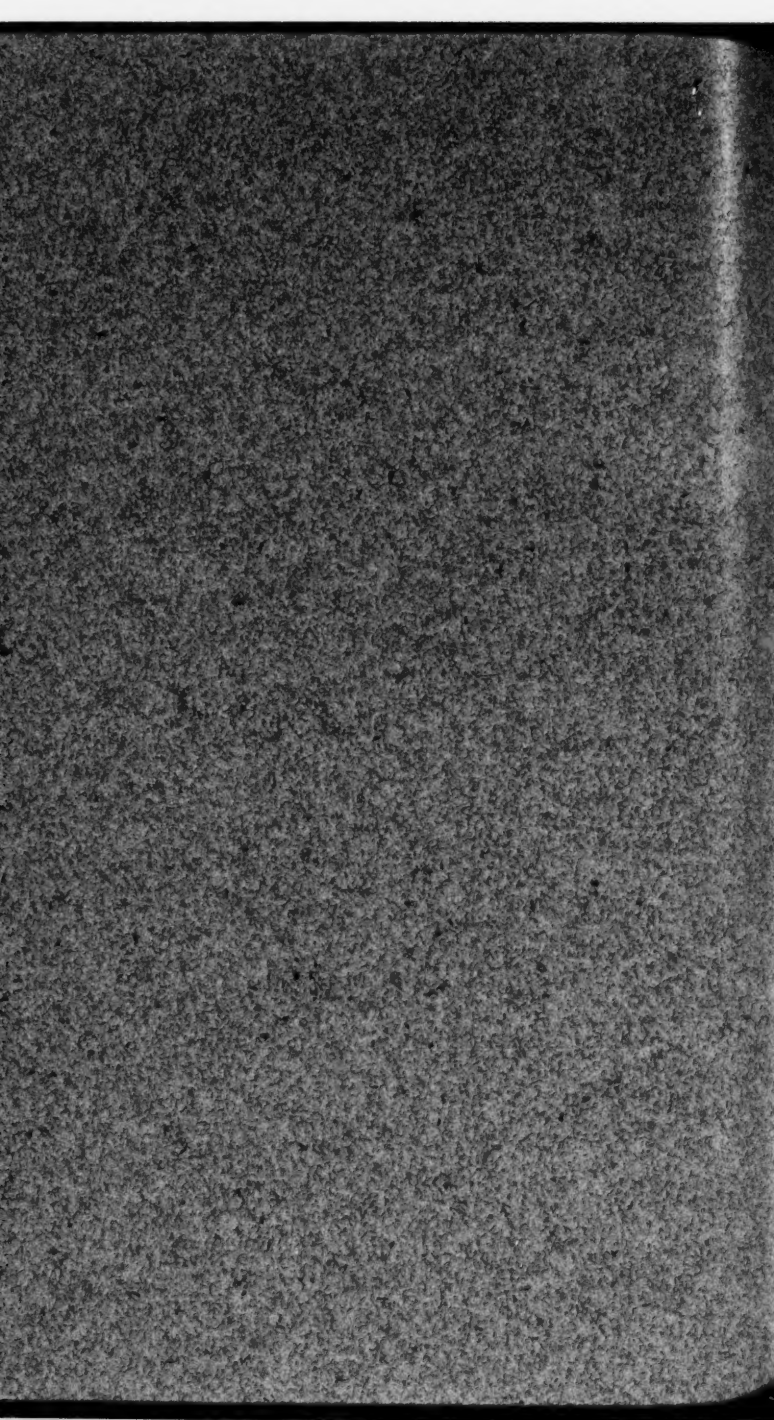
BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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JOSIAH H. DRUMMOND,

Of Counsel.

The Standard Printing Company, 25 Broadway, N. Y.



IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

No. 155.

UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

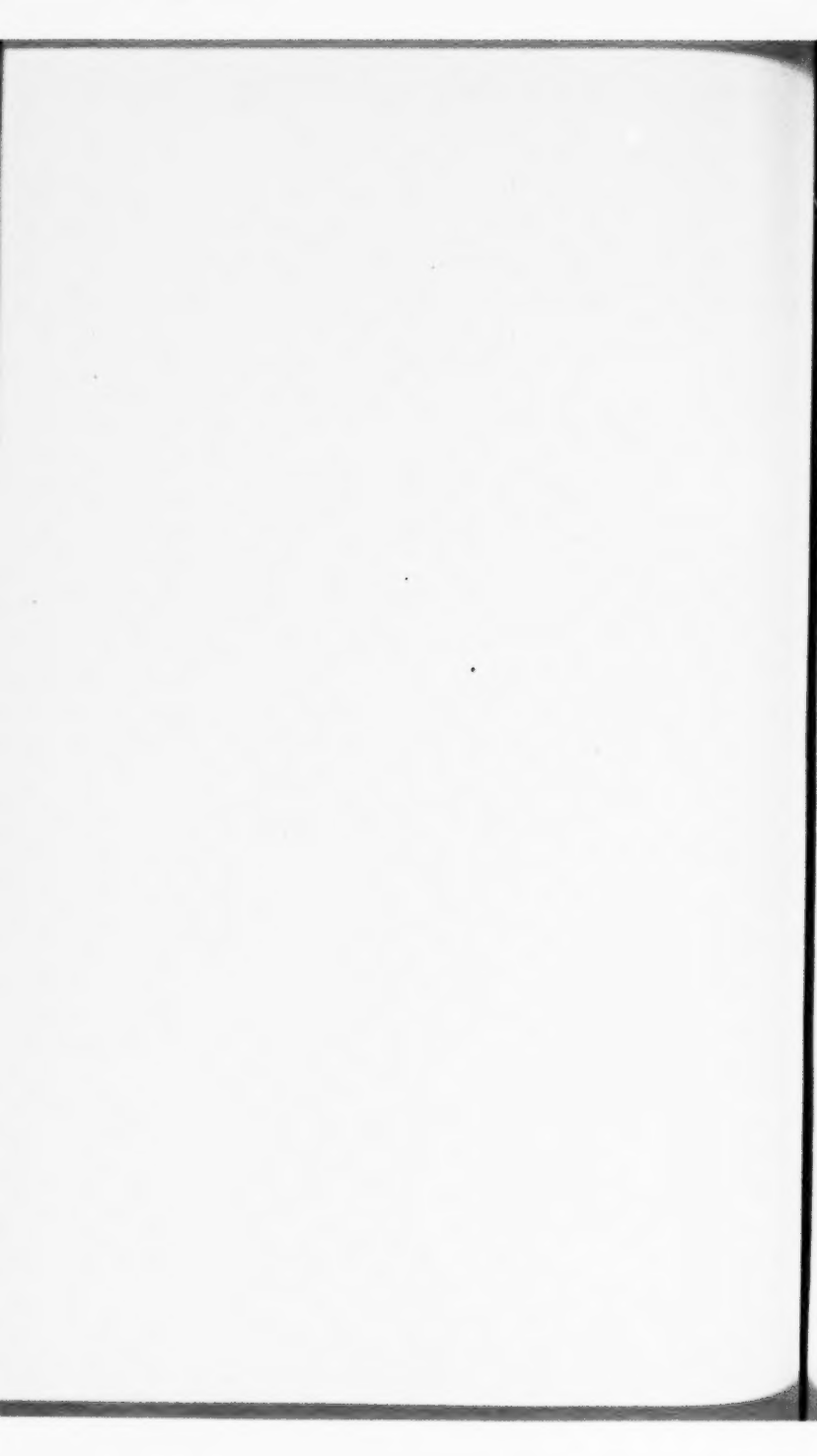
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vs.

ELIZABETH KIRCHOFF.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

The litigation in this case began with a bill in chancery filed by Elizabeth Kirchoff in the Circuit Court of Cook County, at Chicago, in which complainant (defendant in error here) sought a decree for the redemption of two tracts of land from a trust deed which she had given to the Union Mutual Life Insurance Company in 1871; the bill expressly showing on its face, that the trust deed had been foreclosed and that the interest of the Insurance Company had, some time previously, been converted from that of a mortgagee, into that of an absolute owner, through judicial proceedings in the United States Circuit Court for the Northern district of Illinois.

The ground upon which defendant in error rests her claim of right to this redemption is a supposed verbal agreement which she insists the Insurance Company made with her in 1878, soon after its foreclosure bill had been filed in the United States Circuit Court.

As stated in her bill, the agreement was in substance that the Insurance Company would proceed with its foreclosure suit to completion and take the title to all the mortgaged property; that after its title had been perfected, it "would allow your oratrix *to redeem from said trust deed* the said two lots of land, hereinbefore specifically described" (Rec., 23), upon the consideration of the payment of \$10,000 in installments of \$1,000 a year, and to effect this result, would convey its absolute title, derived through such foreclosure, by deed to Mrs. Kirchoff, the purpose of this agreement, as stated in her bill, so far as it related to the foreclosure suit, being to free the land from certain judgments against the Kirchoffs. (Rec., 24.)

As originally framed in June, 1882, the bill avoided a prayer for redemption in express terms, but having set out an agreement for redemption, the bill prayed that the defendant "may be compelled by the decree of this court specifically to perform the said agreement with your oratrix and convey to her the said two lots of land hereinabove specifically described." (Rec., 15.)

To this bill, regarded solely as a bill for the specific performance of a verbal contract for the sale of land, the Statute of Frauds would have been a complete defense, and to avoid this difficulty the bill was amended in 1887, so that it asked "that your oratrix be allowed to redeem said premises according to the terms of said agreement." (Rec., 25.) It is this prayer which the State Courts have

granted, as appears from the statement of the Supreme Court of Illinois, that

“ We have said nothing in reference to the argument that this is a bill for specific performance, and hence falling within the Statute of Frauds, as we do not regard it as a bill of that character.” (Rec., 311 ; 133 Ill., 368, 380.)

On the part of the Insurance Company, it is contended that the foreclosure proceedings in the United States Circuit Court are all they purport on their face to be ; that the foreclosure decree cut off not only all the rights and interests of junior incumbrancers, but all the rights of all the defendants to the suit in the mortgaged property, and of all persons claiming through or under them, except in so far as those rights were preserved by the statute providing for redemption, and that the State Court had no jurisdiction to review that decree, or to permit redemption from a mortgage which had been foreclosed thereby.

On the part of the defendant in error, it is claimed that notwithstanding the foreclosure in the Federal Court, and the deeds issued to the Insurance Company thereunder, she is still entitled to a mortgagor's interest in the land, by virtue of the alleged agreement, which, it is said, was not cut off by the foreclosure decree, although it was made, if made at all, before the decree was entered, and relates to the subject-matter passed upon by the decree.

It is our purpose in presenting the case to this Court to argue only the questions of law which are involved. These questions arise partly upon the face of the pleadings, the decree and the opinions of the State Courts, and partly upon the evidence in the record. It will be necessary, therefore, to look into the evidence and record, sufficiently, to show what questions of law are presented to this Court for review.

STATEMENT OF FACTS.

On the 8th day of May, 1871, the defendant in error and her husband, being the owners of certain lots in Chicago, and Mrs. Kirchoff's mother, Angela Diversey, the owner of certain other lots in Chicago, and a farm in Cook County, joined in a note to the Insurance Company (plaintiff in error) for \$60,000, secured by trust deed upon nearly all the property belonging to them. This note matured in three years and bore interest at the rate of eight per cent.

The husband of defendant in error, for whose benefit the loan was negotiated, was not prosperous in business and failed to pay either the interest or principal coming due. He soon went into bankruptcy (Rec., 125), and, in 1876, the note, with accrued interest, amounted to upwards of \$75,000, while the real estate securing it, stricken by the panic of 1873, was worth less than that amount. (Rec., 134.)

About this time Mrs. Diversey awakened to the danger of her situation upon Kirchoff's indebtedness. Having gotten herself into difficulties through the importunities of one son-in-law, she seems to have sought a way of getting out through the advice of another. (Rec., 124.) In July or August, 1877, some kind of a proposition was made to extend the whole loan for ten years, reducing the interest from eight to five per cent.—five per cent. of the principal to be paid with each semi-annual payment of interest. (Rec., 264.) These negotiations, however, failed, chiefly through the advice of Mr. Weckler, Mrs. Diversey's other son-in-law, against her making herself

liable a second time for Kirchoff. (Rec., 124.) About this time a judgment was entered up by the Insurance Company against Mrs. Diversey for \$75,696.89 upon the note executed collaterally with the trust deed. (Rec., 124.)

No further steps of any definite character were taken by either of the parties to the mortgage until the 11th of July, 1878, at which time the Insurance Company filed its bill in the United States Court to foreclose its mortgage. (Rec., 191.) The bill, in addition, sought to correct a misdescription of property, named in the mortgage, belonging to Mrs. Diversey. The defendant in error and her husband were defaulted on the 11th of November, but Mrs. Diversey, on the 20th of the same month, filed an answer, denying the right of the Insurance Company to correct the misdescription, and averring that the notes and mortgage were procured from her by misrepresentation. (Rec., 191.) From this date the relations of the parties seem to have remain unchanged until about the 9th of June, 1879. In the mean time, however, the Insurance Company was urging its attorney, Kendall, to use vigorous measures to push the case to a speedy termination. (Rec., 271, Ex. 137.)

There was during this interval more or less negotiation between Warfield and Kendall, the agent and attorney of the Insurance Company, and Mrs. Diversey and the Kirchoffs, respecting an adjustment of the loan. All the parties had discovered, by the last appraisement made, that the value of the property had sunk considerably below the amount of the loan. (Rec., 217.) Under such circumstances both Mrs. Diversey and the Kirchoffs were naturally desirous of making an arrangement by which they should all be released from an impending deficiency de-

creed. Mrs. Diversey desired, of course, to save as much of her property as possible; and, therefore, probably as a make-weight in the negotiations, resisted the effort to correct the misdescription in the trust deed. The Kirchoffs, equally anxious to be released from a deficiency decree, were willing to repurchase the farm and the two lots, upon one of which their homestead stood, at a valuation of \$25,000, to be evidenced by long paper, bearing interest at four per cent. (Rec., 126; Letter, November 25, 1878.) But neither this nor any other proposition of the Kirchoffs could be finally acted upon by the Insurance Company, until a settlement with Mrs. Diversey should first be agreed upon; otherwise, as Kendall wrote to the home office on the 1st of January, 1879, "it might prejudice our claim against Mrs. Diversey." (Rec., 127, 216, Ex. 29.)

On March 21, 1879, Kendall wrote the company as follows:

"Mrs. Diversey will agree to settlement on basis proposed sometime ago to the company by me and assented to by letter of vice president, viz.: Let her keep forty acres of her farm and execute quitclaim of the rest; *Kirchoff and wife to quitclaim all their property covered by our mortgage.* The old trust deed on the Diversey farm prior to ours to be released, etc., and everything made tight and safe." (Rec., 289.)

Finally, about the 9th of June, 1879, an agreement was reached by which the Insurance Company was to release to Mrs. Diversey its claim upon forty acres of land belonging to her, and she was to execute to it a warranty deed for the remainder of the premises. (Rec., 129.)

At the same time, a quitclaim deed, including all of the property belonging to Mrs. Kirchoff and her husband was prepared by them. None of these deeds were de-

livered, however, until the 11th of September, when Kendall, acting for the Insurance Company, received from Mrs. Diversey her deed and delivered to her the release deed of the company. About the same time he received from Mrs. Kirchoff and her husband the quit-claim deed of all the property belonging to them, and included in the mortgage. The deed from Mrs. Diversey was immediately placed on record. (Rec., 129, 130, 149.) But the deed from the Kirchoffs was withheld from record by Kendall. (Rec. 132, 149, 158.)

The defendant in error insists that during the preceding negotiations, it was agreed, in consideration of her quit-claim deed, that the Insurance Company would re-convey to her the two lots now in question; one of which was then occupied by her as her homestead, and the other cornering upon it, but facing the other way; that the price at which the re-conveyance should be made was their valuation at a previous appraisalment by James H. Rees, namely, \$7,500 and \$2,500, respectively; and that Mrs. Kirchoff was to execute in payment therefor, her notes for \$10,000, extending over a period of ten years, bearing interest at six per cent. and secured by mortgage upon the two lots.

“That thereafter, upon examination of the title to said lots, it appeared that there were certain intervening liens and incumbrances upon the same, created after the execution of said trust deed and prior to the agreement hereinbefore set forth for such redemption by your oratrix, * * * and it was thereupon agreed by and between the said company and your oratrix, that the agreement for said redemption should not be further performed, until the title had been perfected in said company by said foreclosure proceedings, but the further execution thereof should be held in abeyance until after such foreclosure proceedings should be completed *and the title to said lots*

become perfected in said company, discharged of such incumbrances, etc., and in the meantime that your oratrix should interpose no defense to such foreclosure proceedings." (Complainant's Bill, Rec., 24.)

Upon the strength of this alleged agreement the defendant in error insists upon her so-called right of *redemption* in accordance with its terms.

The Insurance Company, on the contrary, having at all times insisted that no such agreement was ever concluded, has also argued that the State Courts are bound by the decree of the Federal Court and have no jurisdiction to review it.

It will not be disputed that propositions similar to the so-called agreement were spoken of and discussed between Warfield and Kendall and the Kirchoffs, or that assurances were given by the former, of the probable willingness of the Insurance Company to sell the lots on the terms named. But the record indisputably shows that, when the Insurance Company was advised of the proposition by Mr. Kendall, it was instantly and unequivocally declined, and this action of the Insurance Company communicated to Mrs. Kirchoff, in time to prevent any injury to her from the quitclaim deed. After having been thus fully advised, she chose to deliver her deed, and, in that manner, get the benefit of the release from her indebtedness, *taking her chances of being able to make the rejected negotiations hold as an agreement.*

As stated above, Kendall caused the Diversey deed to be recorded the next day after its delivery and on the 22d of October following, sent it to the company. (Rec., 221.) The Kirchoff deed, however, was withheld from the records. Its execution was reported to the company, but no mention of any accompanying arrangement whereby the

homestead lots, or either of them, was to be reconveyed to the defendant in error, was communicated or proposed to the company until the first of November following. (Rec., 130, 176.) Warfield and Kendall both knew that they had no authority in the premises, except to communicate propositions to the company. (Rec., 73, 74, 91, 92, 98, 120, 121, 175, 287, 288.) It is more than probable that this delay upon the part of the attorney and agent in Chicago was due to the fact that the exact terms of Kirchoff's proposition had not yet been definitely arranged. Warfield remembers such a misunderstanding. (Rec., 98.) Kendall recalls that "Kirchoff had always objected to paying cash down, but wanted to pay at the end of six months." (Rec., 150.) "I told him that I would submit that proposition to the company, but that I had no idea they would accept it, because they never did—always required a payment down." (Rec., 150, 151.)

Finally, about the 1st of November, 1879, without coming to any conclusion, either on the terms of payment or the price, Kirchoff consenting, however, that the proposition should cover one lot only, a deed covering the homestead lot was drafted, and the proposition *for the first time* communicated to the company. (Rec., 158, 176, 222.) While no direct explanation of this delay in submitting the proposition, is given, Mr. Kendall explains why the Kirchoff deed was withheld from record, and shows, too, that it was understood all around, that no reconveyance could be definitely agreed upon until a proposition therefor was submitted to and approved by the home office of the Insurance Company. His testimony on this subject may be found upon pages 149 and 150 of the printed record, and is substantially as follows :

"When I received the deeds from Mrs. Kirchoff and Mrs. Diversey, I recorded the Diversey deed but held the Kirchoff deed in my office until I should hear from the company in regard to the conveyance to be made to Kirchoff; the Kirchoff deed having been made, as he explained to me, with the understanding on his part that he was to have a deed from the company of his homestead and the adjoining lot on Pine street, I did not feel like receiving it unconditionally. I told Kirchoff that while I had no doubt that the company would make a deed to him of the lot or lots on the terms proposed, I did not wish to do anything final in the matter without first having the formal authorization on the part of the company. * * * *The Diversey deed was placed on record, because that matter I considered as settled, and that I had the proper authority in writing from the company, to warrant my closing the settlement.*" (Rec., 149, 150.)

Also :

"I think I stated the matter somewhat in this way to Kirchoff at the time: That I would take his deed, would write to the company in regard to the conveyance back to him; in the meantime would not put his deed on record, nor take any advantage of him, intending to keep the matter open, so far as I can recollect now, until he had definitely settled the terms of his contract with the company, if he had any." (Rec., 158, 159.)

Kirchoff nowhere denies what Kendall here testifies to. Nothing further was done in Chicago, until the answer of the Insurance Company to this letter of November 1st had been received. That answer was written on the 5th of November, 1879 (Rec., 273, Ex. 144), and unequivocally declined the proposition submitted, or *any* proposition to sell to Mr. Kirchoff. It offered, at any time within the next thirty days, to sell the lot to Mrs. Kirchoff for \$8,400, instead of \$7,000; one-fourth in cash, and the balance in twenty equal semi-annual installments.

Kirchoff and Kendall knew about when to expect an answer to this letter. It is not improbable that when the answer came, Kirchoff was there, and was told its contents. This is the suggestion from Kendall's testimony (Rec., 152, 159), and Kirchoff, while not expressly admitting this in terms, substantially admits the facts. (Rec., 41.) In any event the contents of the answer were promptly communicated to Kirchoff and, the proposition having been declined, Kendall either tendered back the quitclaim deed to Kirchoff, or gave him opportunity to withdraw it. (Rec., 159.) In this he was only carrying out his original purpose in withholding the deed from the record until the home office had been heard from. The evidence on this subject will be set out fully hereafter. See *post*, pp. 63, 64, 65.

But Kirchoff did not wish to withdraw the deed, and thus lose the benefit of its operation as a satisfaction of the indebtedness. Neither did he wish to accept the company's counter-proposition, for that involved, not simply a slightly increased price, but also, what was much more to him, the payment in cash of one-fourth of the purchase money. He therefore concluded to deliver the deed at any rate, and to rely upon what he called his contract, or his previous understanding with Warfield and Kendall, as being sufficiently binding to secure him a reconveyance, notwithstanding its rejection by the company. (Rec., 153, 41, 247.) After this Kendall went on with the foreclosure proceedings. Kirchoff took a lease from the Receiver for the homestead property which he and Mrs. Kirchoff then occupied. In January, 1880, the bill was amended by adding new parties defendant, and notice thereof was served on the Kirchoffs about the 17th of that month. (Rec., 193, 112.) In

July, testimony was taken before the Master, and on the 30th of August, a decree was entered, confirming the report of the Master, and ordering a sale of the premises, except the portion theretofore conveyed to Mrs. Diversey. (Rec., 193.) The sale took place upon the 20th of October, 1880. The property was bid in, in parcels, by the company, for an aggregate amount of \$92,000, that being about \$1,000 less than the amount due. The two lots, of which a reconveyance at the aggregate price of \$10,000 is sought in this suit, were bid in at \$9,000 and \$8,000, respectively. (Rec., 193.)

Meanwhile the Kirchoffs remained in possession of the homestead under their lease from the Receiver, appointed by the Federal court, and paying rent with about as much regularity as they had met their obligations to the company. No further proposition was ever made to the company for the redemption or repurchase of the homestead until the filing of the bill in this case.

During this interval two events occurred which are the real causes of this litigation. In the summer of 1880 Warfield was discharged from the Insurance Company's service, and in January, 1881, Kendall ceased to be its attorney. (Rec., 174.) Shortly thereafter a revival in real estate values came. (Rec., 91.)

When in October, 1881, the Receiver filed a petition for a writ of assistance to obtain possession of the premises, it met with an answer in which Kirchoff, acting, as is stated in the bill, as agent for defendant in error (Rec., 24), alleged that he was entitled to possession under and by virtue of an agreement entered into with the company as far back as 1878, whereby the company agreed to convey to him, or to any person he might name, the two lots upon the consideration of \$10,000, in install-

ments of \$1,000 each, to be secured by a mortgage thereon. (Rec., 107.) The court, upon a hearing, overruled this answer, and issued its writ of assistance. (Rec., 193.)

On the 21st of January, 1882, deeds for these premises were made to the company, and on the 12th of June following, the original bill in this case was filed.

Upon this statement of facts, the first and conspicuous point, which we desire to emphasize, is the fact that the negotiations upon which the defendant in error relies, were concluded by the refusal of the company on the 5th of November, 1879, to accept the proposition of the Kirchoffs. From this time on, then, the Kirchoffs knew that the foreclosure proceedings would continue, and would thenceforth, at least, be hostile to their interests. But the Kirchoffs made no answer to this foreclosure bill; they set up no defense in the foreclosure proceedings; and when the case was afterwards referred to the Master in Chancery, they presented no evidence, nor did they make any suggestion of a hostile claim, the case proceeding regularly to a decree. The property was sold, the Kirchoffs took a lease from the Receiver, and failing to pay rent, a writ of assistance was asked against them, and then, for the first time, the alleged agreement which was relied upon in this suit, saw the light. It was then urged that the Kirchoffs were not bound to pay rent for the reason that there was a contract between them and the Insurance Company by which they should buy the land which they then occupied for a certain sum. The agreement claimed, provided that rent paid to the Receiver should be applied upon the purchase price of the homestead (Rec., 97, 105), but the lease contained no such provision (Rec., 97), the rent being applied by the Receiver

upon the general indebtedness. The question was decided against them by the United States Court, a writ of assistance was issued, and they were ejected. Thereafter the time of redemption expired, Master's deeds were issued to the purchaser, and the title of the Insurance Company under decree of the Federal Court became absolute and indefeasible upon any ground which had been settled by the judgment of that Court.

THE RECORD.

The present writ of error brings to this Court a complete record of all the proceedings of the State Courts in this case, from the filing of the bill in the Circuit Court, down to and including, the last decree of the State Supreme Court rendered on March 31, 1894. The finality of this decree cannot be questioned. The difficulties in this respect, therefore, which were presented upon the former hearing of this case (160 U. S., 374) no longer exist.

The history of the case as shown by the present record may be briefly traced as follows :

Upon the first hearing in the Circuit Court of Cook County the bill was dismissed for want of equity. (Rec., 30.) From this decree an appeal was prosecuted directly to the Supreme Court of Illinois, but was there dismissed on the ground that it should have been taken to the Appellate Court. (Rec., 299 ; 128 Ill., 199.) Thereupon a writ of error was taken from the Appellate Court of Illinois to the trial court, and upon the hearing of that writ, the Appellate Court reversed the decree of the Circuit Court, and the case was remanded for further proceedings in conformity with the opinion of the Appellate

Court. The order of reversal will be found in the record at page 301. The opinion of the Appellate Court filed in the court below is in the record at page 399. (33 Ill. App., 607.)

The Insurance Company considering this order of reversal, a final order, prayed an appeal from the decision of the Appellate Court, to the Supreme Court of the State. This appeal was granted by the Appellate Court. The Supreme Court took jurisdiction of the case, and upon the hearing affirmed the judgment of the Appellate Court; the order of affirmance and the opinion rendered at the same time, appearing in the record at page 305. (133 Ill., 368.)

To this judgment of the Supreme Court of Illinois a writ of error was directed from this Court, but upon the hearing was dismissed, on the ground that the judgment of the Supreme Court of Illinois was not a final judgment. (160 U. S., 374.) In the meantime the order of the Appellate Court, which directed an accounting, had been carried out and a decree, settling the accounts between the parties and allowing redemption was entered in the Circuit Court of Cook County, on the 26th of January, 1893. This decree stated that it was entered in accordance with the opinions of the Supreme and Appellate Courts. (Rec., 409.) From this decree the Insurance Company appealed to the Appellate Court, and the record on this appeal consisted of a transcript of the pleadings in the case and a stipulated statement of the evidence and record, made on the first hearing (being substantially a duplicate of that record), together with the record made after the case was remanded to the trial court for the accounting. Upon this record the Appellate Court affirmed the decree of the Circuit Court, the

order of affirmance appearing at page 511, and the accompanying opinion at page 514. (51 Ill. App., 67.) This judgment of the Appellate Court was affirmed by the Supreme Court, the order and opinion appearing in the record at page 515. (149 Ill., 536.) It is this double record which is thus brought before this Court by the present writ of error.

The jurisdiction of this Court over the present case is established when we show :

First. That a Federal question is involved.

Second. That this Federal question is presented on the record of the case.

Third. That the Federal question was decided by the State Court adversely to the title there claimed under Federal authority.

Fourth. That the Federal question is conclusive of the case.

The defense set up by the Insurance Company is based upon a title derived through judicial proceedings in the Federal Court.

Roby v. Colehour, 146 U. S., 153.

Embry v. Palmer, 107 U. S., 3.

Dupasseeur v. Rochereau, 21 Wall., 130.

The portions of the record presenting the Federal question are found in the allegations of the bill, the defendant's answer thereto, and in the evidence upon this subject introduced by the Insurance Company.

The amended bill (Rec., 22-26) alleges that in 1871 Mrs. Kirchoff mortgaged several tracts of land to the Insurance Company; that in 1878, default having been made by the mortgagors in the payments called for by the mortgage,

foreclosure proceedings were instituted by the Insurance Company.

The bill then alleges that thereupon it was agreed between the parties that the mortgagor should convey all the mortgaged property to the Insurance Company, that the Insurance Company would receive this conveyance in full satisfaction of its debt, and that Mrs. Kirchoff should then have the right to "redeem from the trust deed" two tracts of land known as lots 2 and 4.

The bill then proceeds as follows:

"That afterwards, pursuant to the agreement aforesaid, your oratrix and her husband executed, acknowledged and delivered to said company a deed of release and quitclaim of all and singular the land and premises belonging to your oratrix, described in said trust deed, including the said lots hereinbefore specifically described, which said deed, as your oratrix is informed and believes, has since been recorded in the recorder's office of said county, and to said deed or the record thereof your oratrix prays leave to refer, if it be necessary so to do.

That thereafter, upon examination of the title to said lots, *it appeared that there were certain intervening liens and incumbrances upon the same, created after the execution of said trust deed and prior to the agreement hereinbefore set forth for such redemption by your oratrix, and it was thereupon represented to your oratrix by said company through its attorney, that it would be necessary to foreclose said trust deed in order to make good title in said company to said lots of land before it could take mortgage thereof for said installments of redemption money, and it was thereupon agreed by and between the said company and your oratrix that the agreement for said redemption should not be further performed until after the title had been perfected in said company by said foreclosure proceedings, but the further execution thereof should be held in abeyance until after such foreclosure proceedings should be completed and the title to said lots become perfected in said company, discharged of such incumbrances, etc., and that in the meantime your ora-*

trix should interpose no defense to such foreclosure proceedings.

And your oratrix further shows unto your Honors that the said company, in pursuance of said agreement, afterwards continued the prosecution of its suit in the Circuit Court of the United States for the Northern District of Illinois, for the foreclosure of said trust deed, and obtained a decree of foreclosure and sale, under and by virtue of which said decree said lots were afterwards, to wit: on the 20th day of October, A. D. 1880, offered for sale by the master in chancery of said court, and were sold and struck off to said company at said sale as follows, to wit: said lot two (2) for the sum of nine thousand dollars (\$9,000), and said lot four (4) for the sum of eight thousand dollars (\$8,000), and that deeds of said lots have since been issued and delivered to said company by the said master in chancery, and have been recorded in said recorder's office.

That in said suit for foreclosure the said company procured the appointment of a Receiver of all the land and premises involved in said suit, your oratrix making no defense to said suit, and that on, to wit: the 16th day of November, 1881, said Receiver demanded possession of said lot two (2), which was occupied by your oratrix and her husband as a homestead, and applied to said court for a writ of assistance to put him, said Receiver, in possession thereof.

That thereupon *your oratrix, through her said husband, resisted said application* for said writ of assistance, and set up as defense to the application of said Receiver an answer setting forth in substance the aforesaid agreement between said company and your oratrix, *but said company, through its solicitors employed in said suit, supported the application of said Receiver, and wholly disregarded its agreement with your oratrix* and procured order of said court for the assistance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead.

And your oratrix well hoped that upon the execution and delivery of said master's deeds of said lots to said company (which said deeds were issued on or about the 21st day of January, A. D. 1882), the said company

would in good faith keep and perform its said agreement with your oratrix, and convey said two lots to your oratrix upon the terms aforesaid.

But now so it is the said Union Mutual Life Insurance Company utterly refuses to carry out its said agreement with your oratrix, and falsely and fraudulently *claims to hold and own said two lots of land in fee simple absolute, free and discharged of any equitable interest therein on the part of your oratrix*, and seeks to deprive your oratrix of her rights in the premises, and refuses to convey to your oratrix the said lots of land, or either of them, upon the terms agreed upon as aforesaid, and gives out and pretends that no such agreement was ever made or entered into between said company and your oratrix.

Whereas, your oratrix charges the contrary to be the truth, and that *she is justly entitled to redemption* of said lots, and a conveyance from said company upon the terms aforesaid.

And your oratrix further shows unto your Honors that she has in good faith kept and performed her part of said agreement, *for the redemption of said lots*, so far as she has been able to do, by the delivering of her said deed of release and quitclaim to said company, and has refrained from interposing any defense to said foreclosure proceedings, in full faith and reliance that the said agreement would be kept and performed by said company, and that she has always been and is now ready and willing to keep and perform the whole of said agreement on her part to be performed.

All which actings, doings and pretenses of said company is contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your oratrix in the premises.

In further consideration whereof, and forasmuch as your oratrix is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity where such things are perfectly cognizable and relievable, to the end, therefore, that said Union Mutual Life Insurance Company may true answer make to all and singular the premises (but not under oath, the benefit whereof is expressly waived by your oratrix); that your oratrix *may be allowed to redeem*

said premises according to the terms of said agreement; that said defendant may be compelled by the decree of this court to perform the said agreement with your oratrix, and convey to her the said two lots of land hereinbefore specifically described, according to the terms thereof, as before stated, and account to your oratrix for the rents and profits of said premises since the date of said agreement, your oratrix being ready and willing and duly offering to perform the said agreement in all things on her part, and that your oratrix may have such other and further relief in the premises as the equities of her case may require and to your Honors shall seem meet."

The defendant demurred to this bill; the demurrer was overruled; the defendant then answered, admitting the foreclosure proceedings in the United States Court and its claim of title thereunder, reserving a demurrer in its answer, and upon hearing introduced in evidence the record of the foreclosure proceedings in the Federal Court. When it came to making up the record for appeal it was considered unnecessary by Mrs. Kirchoff's solicitors, who prepared the record, to incorporate therein a copy of all the papers filed in the foreclosure suit, and in their place was inserted a stipulation as follows:

"It is hereby stipulated that, for the purpose of rendering the record less voluminous, said papers may be omitted by the clerk in making up the record, and that the following stipulated statement of facts may be inserted in said record in lieu of said files, namely:

First. That the defendant company filed a bill in the United States Circuit Court for the Northern District of Illinois, upon the 11th day of July, 1878, for the purpose of foreclosing the deed of trust from Julius Kirchoff, Elizabeth Kirchoff and Angela Diversey to Levi D. Boone, dated May 8, 1871, which said deed of trust was given to secure the joint judgment note of said last three named grantors. Said bill sought to foreclose said trust deed as to all of the property therein mentioned (except that which had been previously released), including the

property involved in this suit, namely: lots two (2) and four (4), in block twenty-one (21), in the Canal Trustees' subdivision of the south fractional quarter of section three (3), township thirty-nine (39) north, range fourteen (14) east of the third principal meridian; that the bill also sought to correct an error in the description of the property in the trust deed belonging to Mrs. Diversey.

Second. August 9, 1878, an alias chancery subpoena, returnable the first Monday in September, 1878, was issued to all the defendants and service had upon the 10th day of August, as appears by the return of the marshal. It appears by said return that Elizabeth Kirchoff was served by leaving a copy of the subpoena with her husband.

Third. That on the 20th day of November, 1878, Angela Diversey, one of the defendants in said last named suit, filed her answer in said cause, in which she averred that the loan secured by said trust deed was not made to her, but that she became a party to the notes and trust deed solely as a surety for Julius Kirchoff, and she denies that there was any mistake in the description of the premises in the trust deed. She further averred that she was induced to execute said trust deed through the false representations of Julius Kirchoff, that is was to secure \$5,000 only, and that the company was aware of the said misrepresentation and of the fact that she was thereby led to execute the trust deed, and denies that the defendant company have a right to recover from her any greater sum.

Fourth. That on the 11th day of November, 1878, there was entered an order in said cause reciting that said Julius Kirchoff, Elizabeth Kirchoff and other defendants being severally called to appear and make answer to the bill, and that none of them appearing, default was taken against them and the bill taken as confessed.

Fifth. That on the 16th day of November, 1878, there was entered in said cause an order appointing Edwin A. Warfield Receiver of certain of the property described in the trust deed, including the premises in question.

Sixth. That on or about the 6th day of September, 1880, the said Edwin A. Warfield, Receiver, filed a writ-

ten report in said cause, by which it appears that the said Julius Kirchoff paid him rent for the use and occupation of said premises.

It is further stipulated that thereafter the said Edwin A. Warfield, Receiver, resigned, and that James R. Page was appointed Receiver in said cause.

Seventh. That on the 28th day of October, 1881, the said James R. Page, Receiver, filed a petition representing that he had been appointed Receiver in said cause; that Julius Kirchoff was in possession of said lots two (2) and four (4) of block twenty-one (21) aforesaid, and that he refused to surrender possession of the same to said Receiver or to pay rent therefor. Said Receiver prayed for a writ of assistance to eject said Julius Kirchoff from said premises.

Eighth. That on the 28th day of October, 1881, the court entered an order upon said Julius Kirchoff to show cause within four days why he should not surrender possession of said premises to said Receiver.

Ninth. That on the 16th day of November, 1881, said Julius Kirchoff filed an answer to said rule; which answer is set out in the record immediately following the testimony of E. A. Warfield.

Tenth. That on the 16th day of November, 1881, the said court issued a writ of assistance, directing the marshal to put said James R. Page, Receiver, into possession of said premises.

Eleventh. That on the 17th day of January, 1880, the bill in said cause was amended, making Eben F. Runyan, of the State of Nebraska; Robert E. Jenkins, assignee in bankruptcy of said Runyan, and George W. Stanford parties defendant, and that on the 15th day of March, 1880, an order of default was taken against said last named defendant, and the case referred to Henry W. Bishop, Master in Chancery, to take proof.

Twelfth. That said Master in Chancery took testimony in said cause, and that on the 2d day of July, 1880, he filed his report, in which he found that the allegations of the bill were true and recommended a foreclosure of said deed of trust.

Thirteenth. That on the 30th day of August, 1880, there was entered in said cause a decree confirming said

Master's report and ordering said Master to make sale of the entire premises covered by said trust deed, except such parcels as had been theretofore released to Mrs. Diversey and others.

Fourteenth. That on the 29th day of October, 1880, the said Master filed in said cause his report, that in pursuance of said decree he did on the 20th day of October, 1880, make a sale of said premises as described in said decree; that the highest bid at said sale was by the complainant for the sum of \$92,000, and that there remained unsatisfied under said decree the sum of \$1,027.24; that said property was offered and struck off in separate parcels, the whole aggregating \$92,000, and that said lot two (2) above described, was bid in for \$9,000, and said lot four (4) for the sum of \$8,000.

Fifteenth. That on the 24th day of February, 1881, there was entered in said cause an order confirming said Master's sale.

Sixteenth. That on the 21st day of January, 1882, the time for redemption having expired, the said Master made deeds to said complainant of the various tracts of land embraced in said deed of trust, including the premises in question.

Seventeenth. That on the 21st day of January, 1882, there was entered in said cause an order approving said Master's deeds."

The answer, filed by Mr. Kirchoff, as agent for defendant in error, to the Receiver's petition for a writ of assistance and verified by him under oath (Bill of Complaint, Rec., 24), is shown in the record, pages 106-108, and is as follows:

"The undersigned, in response to the order heretofore entered herein, upon the petition of James R. Page, requiring him to show cause why a writ of assistance should not issue in said cause directing the marshal to put the Receiver in the above entitled cause in possession of the property in the bill described, says that the issuance of such a writ would be inequitable and unjust and calculated to prejudice the rights of the defendant Julius Kirchoff.

The undersigned begs leave to submit herewith the following statement of facts as grounds for resisting the application for said order.

Previous to the institution of any foreclosure proceeding in this case an agreement was entered into between the complainant and said defendant, whereby, for the consideration hereinafter named, said defendant was to quitclaim to said complainant his interest in certain of the property described in the bill of complaint, including lots 2 and 4, in block 21, Canal Trustees' subdivision in west half of the south-east quarter of section 3, township 39, range 14 east, said last described property being the homestead of said Kirchoff, and a lot near the same, in the vicinity of Rush and Pearson streets, and was to consent to a foreclosure on all of the property described in said bill. On behalf of the complainant it was agreed and distinctly understood with reference to the two pieces of property last described, that the same should be bid off at a sale to be made under the decree to be entered, at such sum as the complainant should see fit, and that after the same had been made, said Kirchoff should be entitled to a reconveyance of the two lots last above described upon payment to complainant of \$10,000—that is to say, said complainant was to convey said two parcels of property to defendant Kirchoff, or to such persons as he should nominate, for a consideration of \$10,000, in ten payments of \$1,000 each, one thousand to be paid upon the tender by complainant to said Kirchoff of a deed of said property within one year from the date of the Master's deed to complainant under said decree, and the residue of the unpaid consideration of \$10,000 was to be secured by a lien on the lots, and made payable in nine equal payments of \$1,000 each, as aforesaid, and this respondent executed a quitclaim deed to said complainant in pursuance of said agreement.

The undersigned now avers that complainant regardless of its duties and obligations in the premises, and contrary to justice and equity, claims to own said property absolutely, and refuses to convey the same to the undersigned in pursuance of said agreement.

The undersigned further states that according to the terms of said agreement no deficiency decree was to be

entered, or if entered, the same was to be canceled without payment; that the undersigned is not indebted to said complainant in any sum whatever; that he has been willing and still is willing to faithfully fulfill his undertaking in the premises; that said property is worth a sum greatly in excess of \$10,000, and that at the time of the foreclosure the property covered by the liens described in the bill was worth much more than all sums of money due from the undersigned to said complainant, and that he would not have executed said deed but for the agreement so made by said complainant to transfer to him the title to the said lots 2 and 4 upon the terms named.

Said Kirchoff further states that his solicitors have in course of preparation a bill in chancery, setting up the foregoing facts and asking *that complainant be required to execute its undertakings in the premises, or in default thereof that the decree herein be set aside and held for naught.*

The undersigned further states that he has frequently offered to perform and has at all times been ready and willing to perform said contract upon his part by the payment of \$1,000 and the proper securing of the balance of said sum of \$10,000 upon the execution and delivery to him by said complainant of a deed of said property, and he now here avers his readiness to perform said contract upon his part according to the terms of said agreement.

Inasmuch, therefore, as the complainant cannot be prejudiced by delay, your objector asks that no order of restitution be issued herein for a reasonable time at least."

The record, therefore, presents the question as to the claim of title made by the Insurance Company under the Federal decree and other proceedings of the Federal Court, and as to the jurisdiction of the State Court to review the decree of the United States Court. The question of the Insurance Company's claim of title under Federal authority was clearly presented by the allegations of the bill, and answer, and by introducing in evidence the record of

the foreclosure proceedings in the United States Court. It also appears from the record that the question of jurisdiction was presented to and passed upon by all the State Courts of Illinois, from the trial court to the Supreme Court. The question was first presented by a demurrer to complainant's bill; it was afterwards presented by the reservation of a demurrer in the answer, and upon this record was actually heard in the State Courts, and was passed upon in the opinion of the Supreme Court of the State. (Rec., 305.)

This is shown in the first place, by the fact that in order to render any decision in the case it was necessary for the State Courts to determine whether or not they possessed jurisdiction over the subject-matter of this controversy. The fact that a decree was entered in the State Courts was of itself an adjudication that those courts had jurisdiction to enter a decree. Furthermore, the opinion of the Supreme Court of Illinois, while dealing very briefly with the question, as, perhaps, was necessary in view of the authorities, and the evidence will, nevertheless, be found to have directly passed upon the subject. (Rec., 305.)

Justice CRAIG, in delivering the opinion of the Supreme Court, in deciding the question, says:

"It is also claimed that complainant's failure to assert the alleged agreement in the foreclosure proceedings is a bar to its assertion here, and that the proceedings in the foreclosure are conclusive. We are unable to concur in this position. It was a part of the arrangement under which the complainant was to obtain the two lots in controversy, that a decree of foreclosure should be entered, and that the premises should be sold under such decree. The decree was rendered and the sale made by consent, for the purpose of clearing the different tracts of land mentioned in the quitclaim deed from certain incum-

brances. The decree was not adverse to the interest of complainant, but in harmony with her interest; she is not attacking the decree, but claiming the enforcement of an agreement under which it was rendered, and in our judgment there is no ground for holding that the rights of complainant were cut off or in any manner impaired by the decree." (Rec., 311.)

In its opinion on the last appeal, the Supreme Court of Illinois held that "the merits of the case were settled adversely to the company," by its former opinion to which reference has just been made, and, so far as the Federal question is concerned, the last opinion was merely an affirmance of the former. (Rec., 516.)

It therefore clearly appears from the foregoing :

First. That the bill in this case recited the foreclosure proceedings in the United States Court and alleged that defendant claimed to hold an absolute title to the lots in question, by virtue of these proceedings and of the Master's deeds obtained thereby. (A title claimed under an authority exercised under the United States.)

Second. That the defendant answered, reserving therein the advantage of a demurrer, and admitting and averring the claim of absolute title under the Federal decree and deeds.

Third. That the defendant introduced in evidence the record and decree of the Federal Court in support of the title which is thereby claimed.

Fourth. That a Federal question was thereby raised on the record in the State Court by the pleadings and proof.

Fifth. That any decision of the case necessarily involved passing on this claim of title, and the decision of this question.

Sixth. That the opinion of the Supreme Court of Illinois shows that the question was actually passed upon by that court.

Seventh. That the necessary effect of the decree and judgment of the State Court was against the right and title claimed by the defendant under Federal authority.

The present writ of error is thus brought, not only within the letter, but also within the spirit of section 709 of the Revised Statutes, as that section has been construed and applied in numerous cases by this Court.

Harris v. Dennie, 3 Peters, 292.

Davis v. Packard, 6 Peters, 41.

Crowell v. Randall, 10 Peters, 368.

Murdock v. City of Memphis, 20 Wall., 590.

Dupasseeur v. Rochereau, 21 Wall., 130.

Murray v. Charleston, 6 Otto, 432.

Embry v. Palmer, 107 U. S., 3.

Factor's Ins. Co. v. Murphy, 111 U. S., 738.

Crescent Co. v. Butchers' Union Co., 120 U. S., 141.

Roby v. Colehour, 146 U. S., 153.

Dowell v. Applegate, 152 U. S., 327.

Stanley v. Schwalby, 162 U. S., 255.

Among the more recent cases in which this Court has taken jurisdiction, under circumstances similar to those in the case at bar, may be cited the case of *Roby v. Colehour*, 146 U. S., 153, and *Dowell v. Applegate*, 152 U. S. 327. In the former case the grounds for the jurisdiction of this court were much less apparent than in the case at bar. In that case it did not appear, either from the

opinion of the court of original jurisdiction, or the opinion of the Supreme Court of Illinois, that either court passed upon any question of a Federal nature, the facts with reference to the questions decided by the State Court appearing in the record in the shape of a certificate of the chief justice of the State Supreme Court. In the course of the opinion of this Court in the Roby case, Mr. Justice HURLAN, speaking for the Court, said :

“ But although it does not appear from the opinion of the court of original jurisdiction or the opinion of the Supreme Court of Illinois, that either formally passed upon any question of a Federal nature, the necessary effect of the decree was to determine, adversely to Roby, the rights and immunities claimed by him, in the pleadings and proof under the proceedings in bankruptcy to which reference has been made. * * * Our jurisdiction being invoked upon the ground that a right or immunity specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment. The present case may be held to come within this rule. In view of the certificate by the Chief Justice of the state court the office of which, as said in *Parmelee v. Lawrence*, (11 Wall., 36), was, as respects the Federal question, ‘to make more certain and specific what is too general and indefinite in the record,’ we are not disposed to construe the pleadings so strictly as to hold that they did not sufficiently set up and claim the Federal rights which that certificate state were claimed by Roby, but were withheld, and were intended to be withheld from him by the court below.”

In the case of *Dowell v. Applegate*, above cited, this court said:

“ From this history of the litigation between the parties, it appears that Dowell, in his answer to this suit, asserted his right to the forty acres in dispute under and by virtue of the decree in the proceedings in the Circuit Court

of the United States. That right having been denied by the judgment of the Supreme Court of Oregon affirming the judgment of the Circuit Court of Douglas County, *it is necessary to inquire—*

“First, whether the decree and proceedings in the Federal court were, as claimed, void for want of jurisdiction to hear and determine the suit which was instituted by Dowell in the Circuit Court of Douglas County, Oregon, and was subsequently removed into the Circuit Court of the United States for the District of Oregon ;

“Secondly, whether if such decree and proceedings were not void, the State court gave due effect to them when adjudging that Dowell took nothing by his purchase of the lands in dispute under that decree.

“If these questions be determined in favor of Dowell, then the judgment below was erroneous in that it denied a right specially set up and claimed by him under authority of the United States.”

In the case of *Dupasseeur v. Rochereau*, 21 Wall., 130, this Court said :

“Where a State court refuses to give effect to the judgment of a court of the United States, rendered upon the point in dispute and with jurisdiction of the case and of the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing a Circuit Court and vesting it with jurisdiction ; and hence it would be within the judicial power of the United States, as defined by the constitution ; and it is clearly within the chart of appellate power given to this court over cases arising in and decided by the State courts.”

ASSIGNMENT OF ERRORS.

1. The Supreme Court of the State of Illinois erred in that its findings and judgment are contrary to the law.

2. The Supreme Court of the State of Illinois erred in that its findings and judgment are contrary to the evidence.

3. The Supreme Court of the State of Illinois erred in affirming the judgment of the Appellate Court and the decree of the Circuit Court of Cook County, Illinois.

4. The Supreme Court of the State of Illinois erred in holding that the defendant in error was entitled to redeem.

5. The Supreme Court of the State of Illinois erred in holding that the Circuit Court of the said State of Illinois had jurisdiction to set aside, modify and impair the title acquired by plaintiff in error under the judicial authority of a Court of the United States.

6. The Supreme Court of the State of Illinois erred in holding that the State Courts had jurisdiction to enter a decree for redemption from the trust deed after the said trust deed had been foreclosed by the decree, orders, and authority of the United States Court.

7. The Supreme Court of the State of Illinois erred in holding that the defendant in error was entitled to a decree of redemption in the State Courts from the judicial sale made under the decrees and authority of the United States Court.

8. The Supreme Court of the State of Illinois erred

in that no agreement, such as it found, for redemption was in fact made.

9. The Supreme Court of the State of Illinois erred in holding that such an agreement had the effect of undoing the decree, sale, and acts of the United States Court to the extent of permitting a redemption the same as if such decree, sale and acts were not in existence.

10. The Supreme Court of the State of Illinois erred in deciding against the title, right, and privilege claimed by the plaintiff in error under authorities exercised under the United States.

11. The Supreme Court of the State of Illinois erred in holding that the order and judgment of the Circuit Court of the United States, on the application of the plaintiff in error for a writ of assistance, was not an adjudication of the questions involved in this suit.

12. The Supreme Court of the State of Illinois erred in holding that the present action was not barred by the foreclosure proceedings in the United States Circuit Court.

13. The Supreme Court of the State of Illinois erred in that its judgment or decree does not give full faith, credit, and effect to the decree, proceedings, and acts of the United States Circuit Court under which plaintiff in error acquired title to said premises.

14. The Supreme Court of the State of Illinois erred in entering a decree which is a direct and positive interference with the rightful authority of the United States Court for the Northern District of Illinois. (Rec., 6, 7.)

BRIEF.

I.

THIS IS A BILL TO REDEEM FROM A MORTGAGE WHICH HAD BEEN PREVIOUSLY FORECLOSED IN THE FEDERAL COURT. SUCH A BILL IS NECESSARILY A BILL TO REVIEW THE FORECLOSURE DECREE AND IS BEYOND THE JURISDICTION OF THE STATE COURTS TO ENTERTAIN.

- a. *The subject matter of the bill makes out a bill of review.*

Randall v. Howard, 2 Black, 585.

Nougue' v. Clapp, 101 U. S., 551.

Graham v. R. R. Co., 118 U. S., 161.

Ras v. Hulbert, 17 Ill., 572.

Frisby v. Withers, 61 Tex., 134.

- b. *The bill does not state such a case as may be the subject of an original bill to set aside a decree for fraud.*

Gaines v. Fuentes, 92 U. S., 10.

Barrow v. Hunton, 99 U. S., 80.

Johnson v. Waters, 111 U. S., 640.

Arrowsmith v. Gleason, 129 U. S., 86.

- c. *It was a part of complainant's case to allege and prove that the facts now relied upon for relief, could not have been brought forward in defense of the previous suit. In the absence of such allegation and proof, the present bill is merely a bill for a re-hearing.*

Marshall v. Holmes, 141 U. S., 589.

Avery v. United States, 12 Wall., 304.

II.

THE FACT THAT THE PROCEEDINGS IN THE STATE COURTS REVIEW THE FEDERAL FORECLOURE DECREE, IS SHOWN BY THE EFFECT OF THE DECREE OF THE STATE COURTS UPON THE FEDERAL DECREE.

- a. *The only fraud charged in complainant's bill is that she conspired with the Insurance Company to defraud her creditors; the bill states an illegal agreement.*

Randall v. Howard, 2 Black, 585.

Dent v. Ferguson, 132 U. S., 50.

Connolly v. Cunningham, 5 Pac. Rep., 473.

- b. *To give effect to this agreement by a decree of the State Court would be to impose upon the Federal foreclosures decree, an operation which would be illegal under Federal law, and which the Federal Court would not permit, if it had full control of its own decree.*

III.

THE FEDERAL DECREE OF FORECLOSURE IS CONCLUSIVE OF THE MATTER LITIGATED IN THE PRESENT SUIT.

- a. *Assuming the existence of the agreement found by the State Courts, nevertheless the evidence shows that ten months before the decree in the Federal Court was entered, the Insurance Company notified the defendant in error that it refused to recognize the contract which she claimed. (Rec., 152, 159; 41, 297.)*

There are no findings made by the State Court upon the proposition last stated, and the fact being shown from the evidence without substantial contradiction, this Court will look at the evidence in determining the legal questions thus presented.

Dushane v. Beall, 161 U. S., 513.

Stanley v. Schwalby, 162 U. S., 255.

There must have been some way by which the Insurance Company could procure a judicial determination of the dispute which thus arose during the progress of the foreclosure proceedings, and the course which it adopted of notifying the defendants, pending the foreclosure, that it denied the contract, was an effective course.

- b. *It was the duty of the Kirchoffs, at once upon the repudiation by the Insurance Company of the contract claimed, to interpose their defense in the foreclosure proceeding, if they had any. Having failed to do so, they are precluded by the Federal decree, from setting up claims which existed before that decree.*

Dowell v. Applegate, 152 U. S., 327.

Aurora v. West, 7 Wall., 82, 102.

Cromwell v. County of Sac, 94 U. S., 351.

Case v. Beauregard, 101 U. S., 688.

Dimock v. Revere Copper Co., 117 U. S., 559.

Mally v. Mally, 52 Ia., 654.

Bailey v. Bailey, 115 Ill., 551, 557.

Rogers v. Higgins, 57 Ill., 244, 247.

Harmon v. Auditor, 123 Ill., 122.

Stickney v. Goudy, 132 Ill., 313.

May v. Coleman, 84 Ala., 325.

Jones v. Vert, 121 Ind., 149.

Adan v. Mergentheim, 114 Ind., 303.

Caldwell v. White, 77 Mo., 471, 473.

Shelbina Hotel Assn. v. Parker, 58 Mo., 327.

IV.

THE DECISION OF THE UNITED STATES COURT UPON THE APPLICATION FOR A WRIT OF ASSISTANCE, IS CONCLUSIVE OF THE PRESENT CASE.

- a. *The matter presented to the Federal Court upon the hearing of the petition was precisely the question which was presented to the State Courts, namely: Whether the Insurance Company had made the agreement claimed, and what effect, if any, should be given to such an agreement.* (Rec., 106, 107; 23, 24.)
- b. *The bill in this case shows that the parties before the court were the same in both cases.* (Rec., 24.)
- c. *The United States Court had jurisdiction.*
Minn Co. v. St. Paul Co., 2 Wall., 632.
Freeman v. Howe, 24 How , 450.
Randall v. Howard, 2 Black, 585.

V.

THE FEDERAL QUESTION IS CONTROLLING. NO OTHER QUESTION IS INVOLVED WHICH IS DECISIVE OF THE CASE.

(Rec., 317, 318, 400 ; 305, 311.)

ARGUMENT.

I.

THIS IS A BILL TO REDEEM FROM A MORTGAGE WHICH HAD BEEN PREVIOUSLY FORECLOSED IN THE FEDERAL COURT. SUCH A BILL IS NECESSARILY A BILL TO REVIEW THE FORECLOSURE DECREE AND IS BEYOND THE JURISDICTION OF STATE COURTS TO ENTERTAIN.

The present bill seeks to subject to a trust, in favor of the defendant in error, the apparently absolute title to the land in question, which the Insurance Company acquired, through foreclosure in the United States Court.

Such a bill as this is either a bill to review the foreclosure decree, or a bill to set aside that decree for fraud.

On its face the decree is absolute, and purports to give to the Insurance Company a title which is subject to no other interest whatever. When Mrs. Kirchoff seeks to subject this absolute title to a trust in her favor, she is seeking to deprive the Insurance Company of the full benefit of its decree. It is no answer to say, as the State Courts of Illinois have said, that "she is not attacking the decree, but seeking the enforcement of an agreement under which it was rendered"; for if the agreement deprives the decree of the effect which the court gave it, and if it deprives parties to the suit, of rights which the court gave them, the enforcement of the agreement necessarily involves an attack upon the decree.

The subject-matter of a suit in chancery is the equitable rights of the parties. These rights are settled by the decree, and thereafter, *so long as the decree stands*, each

party has what the decree has awarded him. To ask that rights awarded to one party should be taken from him and given to another party, would be to attack the decree, and the same would be true, if it were sought to deprive a party of the benefit of his decree, by asking that his rights thereunder should be made subject to a trust in favor of another party.

Any prayer that asks that one party be given either the rights, or the benefit of the rights, which were by decree awarded to another, involves an attack upon the decree. This the defendant in error seeks to do by original bill, and her bill must, therefore, be either a bill of review or a bill to set aside the foreclosure decree for fraud.

The first question raised by the present writ of error is, therefore, as to the character of the bill. If it is a bill of review, the State Courts had no jurisdiction to entertain it. As a bill to set aside the decree for fraud, it might, under some circumstances, and if it contained proper allegations, be within the jurisdiction of the State Courts.

Fraud vitiates the most solemn transactions, and when a judgment or decree has been procured thereby, equity, acting upon the person, may compel the surrender of that which has been wrongfully obtained. Under some circumstances, therefore, an original bill may be filed in one court, to set aside a decree previously obtained in another court. The jurisdiction is, however, subject to some necessary limitations, and the first of these is that the fraud complained of must be extrinsic to the issues in the first suit. Equity will not grant a mere rehearing of issues which were, or by proper diligence could have been, fully determined in the first suit. If a rehearing be all that is

sought, it must be given, if at all, by some court having jurisdiction to review the original decree.

It follows then, that any original bill, which seeks to set aside, as fraudulent, the decree of another court, must show, not only that the defendant was guilty of actual fraud, in procuring the decree complained of, but must also show that the complainant's knowledge of the facts constituting this fraud, was derived too late, either to prevent the entry of the decree, or to support an application to set the decree aside. An original bill which failed to make this showing would be nothing more than a suit to obtain a rehearing.

In the present case the bill of complaint filed by Mrs. Kirchoff falls within this principle. It brings forward a number of facts, which, if true, might have been a good defense, in the foreclosure suit, against the entry of any inconsistent decree. It does not allege fraud, extrinsic to the issues in that case.

Furthermore, there is no allegation in the bill as to when the complainant acquired her knowledge of the facts which are now brought forward. The agreement stated is said to have been made, shortly after the foreclosure bill was filed, and in the absence of allegations that the knowledge of the fraud was acquired by the complainant, too late to be set up in the foreclosure suit, the bill states no case of which the State Court could take jurisdiction. No assumption can take the place of this allegation.

In considering the decisions of this Court upon the question, we shall take up, in the first place, cases similar to the one at bar, in which the Court has held that the bill under examination was a bill of review, and we shall hope to show, from these cases, that the bill filed by the

Kirchoffs, in the present case, was a bill of that character.

In the second place, we shall consider a number of cases in which this court has defined the circumstances under which an original bill may be filed, to set aside a decree for fraud, and as a result of such examination, we shall hope to show that the bill is not of this character, and was, therefore, beyond the jurisdiction of the State Courts.

The case which bears the most resemblance to the case at bar is *Randall v. Howard*, 2 Black, 585. That was a bill filed in the Circuit Court of the United States for the District of Maryland, and sought relief from a foreclosure decree, rendered by a court of that State. The ground for the relief asked was an alleged agreement, made before the decree in the State Court, similar to the agreement which is claimed in the case at bar, that the foreclosure should be proceeded with, in pursuance of a "friendly arrangement," that the property should be bought by the complainant in the foreclosure suit and held by him, ostensibly for himself, but really as security for the indebtedness determined by the decree. The bill charged that the sale took place and the defendant was the purchaser ("the friendly arrangement" continuing), and that the property sold for less than its value, on account of the general understanding that the sale was merely a formal one, and not made to divest the estate of the complainants (mortgagors). That the sale was ratified without objection from the complainants, under the assurance from the defendant that the property should, notwithstanding the ratification, stand as a security for the amount agreed, which was to be paid in installments; that to perfect the form of sale and to make it conform to

the ostensible title of the purchaser, the complainant rented the property of the defendant. That, having obtained an apparent title, the defendant fraudulently determined to act as if he was the real owner, and was claiming a right to sell, and that the defendant in furtherance of his object had, by process through the sheriff of the State Court, dispossessed the complainant. The prayer of the bill was to restrain the defendant from disposing of the lands, and for the sale of so much as might be necessary to pay off the defendant, according to the understanding prior to the sale, and that the residue of the lands be conveyed to the complainant.

It was claimed in that case, as in the case at bar, that the decree was entered by consent and in pursuance of a "friendly arrangement", or, as it has been stated in the case at bar, that "the decree was not adverse to the interest of the complainant, but in harmony with her interest; she was not attacking the decree, but claiming the enforcement of an agreement under which it was entered." In discussing the case this Court said :

"Has this court jurisdiction? A conflict of jurisdiction is always to be avoided. Mr. Justice GRIER in *Peck v. Jenness* (7 How., 624), says: 'That it is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court.'

'These rules have their foundation not merely in comity but on necessity. For if one may enjoin, the other may retort by injunction and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other.'

The bill in this case brings in review various matters passed on in the progress of a suit by the Cecil County Circuit Court, a court of general jurisdiction, having

complete control of the parties and of the subject-matter of controversy.

It seeks to annul the sale of lands made by virtue of a decree of the Cecil County Court, sitting as a court of equity in a case pending between these same parties; to affect the distribution of the proceeds of the sale; to enjoin the defendant from making any disposition of the lands purchased by him; to disturb his possession; to invalidate his title, and to have the mortgaged property resold.

This is a direct and positive interference with the rightful authority of the State Court.

If there was error in the proceedings of the court, a review can be had in the appellate tribunals of the state. If, as is charged, the decree is sought to be perverted and made the medium of consummating a wrong, then the court, on petition or supplemental bill can prevent it."

It seems that there is no escape for defendant in error from the effect of this decision. The present case is "upon all fours" with the case to which reference is made. The decision was upon the very matter which is here presented, and supports the contention which the Insurance Company has made throughout the litigation. To the same effect see, also, *Nougue' v. Clapp*, 101 U. S., 551, in which the case of *Randall v. Howard*, was approved and applied under very similar circumstances.

In that case the plaintiff *Nougue'* filed a bill in the United States Circuit Court for the District of Louisiana, setting out certain proceedings of the State Court of Louisiana under which real property, on which *Nougue'* held a mortgage had been sold free of his lien.

The bill alleged that *Clapp*, being the owner of certain land, sold it to *Nougue'* who gave a purchase money mortgage for part of the consideration. *Nougue'* then sold the land to *Schexueyder Bros.*, who assumed the payment of the purchase money mortgage, and, in addition,

gave Nougue' a second mortgage on the land for over \$14,000; that Schexueyder Bros. having paid the mortgage to Clapp, entered into a fraudulent conspiracy with him, to have the property sold under the purchase money mortgage, for the purpose of freeing the land from the junior incumbrance to Nougue'. The bill then states the institution of foreclosure proceedings in a State Court; that Nougue' had not sufficient notice of the pendency of these proceedings, until after the order of sale had been entered, and that he then made an ineffectual effort to stay the same.

The property being sold, Nougue' filed his bill in the United States Court, charging that the foreclosure proceeding was fraudulent and void as against him.

It will be seen, therefore, that the case would have been parallel with the case at bar, if the present bill, instead of being filed by Mrs. Kirchoff, had been filed by one of her creditors, holding a junior incumbrance upon her land. In this respect the case stated by Nougue' was a much more favorable case for the plaintiff than the case made by the bill in *Randall v. Howard*, or in the case at bar, for in both of these cases the plaintiff has admitted participation in a fraudulent conspiracy, while in *Nougue' v. Clapp*, the plaintiff had no connection with the fraudulent agreement and was an injured and not an injuring party.

In passing upon this subject the Court held that the subject-matter of Nougue's bill of complaint, was not within the jurisdiction of any other court, than that which had rendered the decree of which complaint was made. The order of the Circuit Court, dismissing the bill of complaint, was, therefore, affirmed.

We recognize the doctrine established by a number of cases in this Court, which hold that where an unsuccessful party to a suit has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him from court, or by a "false promise of compromise," an original bill may be filed, in equity, to impeach the decree thus obtained, and this in substance was the statement made by this Court, in *United States v. Throckmorton*, 98 U. S., 61.

It is clear, however, that it is not every false promise of compromise that constitutes such a fraud as may be made the subject of an original bill in equity; for in the case of *Randall v. Howard*, there was an agreement for compromise existing between the parties at the time decree was entered, and in the third volume of the reports of this Court after the *Throckmorton* case, we find *Nougue' v. Clapp*, 101 U. S., 551, in which *Randall v. Howard* was approved, and its doctrine applied to another case where there was an existing agreement for a compromise between the parties, at the time that an inconsistent decree was entered.

These cases, therefore, show the necessary limitation upon the broad statement of the rule, viz: *that it is only where relief could not have been had in the first suit, that the fraud may be made the subject of a second suit.*

The statement in the *Throckmorton* case was that where a defendant has, by a false promise of compromise, been prevented from setting up his defense in the first suit, "a new suit may be sustained to set aside and annul the former judgment or decree and open the case, for a new and fair hearing." Where, however, the defendant had opportunity in the original suit to move to set the decree aside, he does not need the interposition of equity to

“open the case” for him. The case is already open and he cannot let his opportunity go by, *for the purpose of setting up his claims elsewhere*. It is his duty to make his defense in the original suit, so far as possible, and where fraud comes to his knowledge after decree, it is his duty to make immediate application, to have the decree, complained of, set aside. In the case of injunctions to restrain the collection of judgments at law, it is well established that,

“Courts of equity will not entertain a bill for an injunction upon an alleged ground that the original demand was unconscientious * * * provided it is competent for the party to have laid those grounds before the jury, on the trial, *or before the court of law upon the motion for a new trial.*” (Story Eq. Jur., Sec. 895.)

The same rule is applied in the case of bills to set aside decrees in equity, and is very clearly stated in *Graham v. Boston, Hartford & Erie R. R. Co.*, 118 U. S., 161, 177.

That was a case where an original bill was filed in the United States Circuit Court for the District of Massachusetts to set aside, on the ground of fraud, a foreclosure decree of a State Court; the bill was dismissed by the Circuit Court and in passing upon the case, this Court quoted, with approval, from the opinion of the Circuit Court as follows:

“To avoid the effect of the foreclosure, the bill charges that the Ellis suit was the result of a fraudulent conspiracy on the part of Ellis, the plaintiff, Lane, the president of the company who represented it in its defense, and the receivers and trustees appointed by the court, entered into for the purpose of embarrassing the company and depriving it of its road and property; and that this fraud was perpetrated by submitting to the court false statements of facts for its decision, and thus obtaining a decree against the company. *The obvious inquiry arises, at this stage*

of the case, why the plaintiff has not brought to the attention of the State Court the fraud alleged to have been practiced upon it, and there sought to have the foreclosure decree revoked. In *Nougué v. Clapp*, 101 U. S., 551, it was held that a Circuit Court of the United States cannot revise or set aside a final decree rendered by a State Court which had complete jurisdiction of the parties and subject-matter, upon the ground that the decree was obtained by fraud, *where the injured party has had an opportunity to apply to the State Court to reverse the decree.* The plaintiff is a party to the foreclosure suit, as a shareholder in the old corporation. The State Court is still open to listen to the complaint of the corporation and its shareholders. The decree of foreclosure, though final in one sense, as determining the respective rights of the parties to the property in question, is still in its nature interlocutory and is open to review by the court upon petition or motion in the cause or by bill of review for good cause shown. Story Eq. Pl., § 421, and note; *Evans v. Bacon*, 99 Mass., 213; Mass. P. S., Ch. 151, § 12. The plaintiff has, therefore, an ample and complete remedy for all his alleged grievances, in the State Court, and there is no occasion for his application to this court for relief by bill in equity. The decree of foreclosure, therefore, now in full force and unrevoked, is a bar to this suit.' These views, so well expressed, are conclusive of this branch of the case, and require nothing more to be said."

The same rule is, also, announced in other courts.

Rae v. Hulbert, 17 Ill., 572, was an action of debt upon a judgment of the Supreme Court of the State of New York commenced in the Cook County Court of Common Pleas. It was pleaded that the judgment was obtained by fraud in that when the defendant was ready for trial in the case in which the judgment was entered, he was induced by negotiations with the plaintiff to send away his witnesses; that, confiding in the false pretenses and fraudulent representations made by the plaintiffs and being deceived thereby, he dismissed his witnesses and al-

lowed them to depart, and departed himself a distance of three hundred miles, and the plaintiffs then took judgment against him. The court says:

“To this plea a demurrer was sustained, and we think very properly. *In this there is no such fraud set out as would vitiate a judgment.* The agreement for the settlement of the suit was a matter properly cognizable before that court, and should have been interposed for the purpose of postponing the trial before the referee, or should have been objected to the report when judgment was moved thereon, or *if for any cause, the defendant could not then present the objection, he should, at the earliest opportunity, have applied to that court to open or set aside the judgment and enforce the agreement to settle, or to let him in with a defense.*”

In the case of *Frisby v. Withers*, 61 Texas, 134, we find a case of remarkable similarity. In that case Withers claimed title to certain land as against Frisby and Gibson, by virtue of a judgment rendered in a state court of Texas. Defendants Frisby and Gibson alleged that the judgment was rendered upon a compromise agreement, made between them and the plaintiff's attorney in that suit, to the effect that Frisby and Gibson were to have conveyed to them the land claimed by them. It was alleged that these defendants had taken all necessary steps to defend the suit, as plaintiff knew; plaintiff was apparently afraid of the effect of this defense, and therefore agreed that if these defendants, Frisby and Gibson, would let the judgment go by default, the plaintiff would make them deeds to the tract of land claimed by them.

Upon this defense the court held that the judgment in favor of Withers was binding upon the defendants and all claiming under them, and the decision of the court was that, “Under the facts pleaded by these defendants, the judgment was not void and *could only be set aside, if*

*at all, by a direct proceeding for that purpose. * * **
Under such facts the court did not err in excluding the evidence which was offered for the purpose of attacking that judgment."

Coming now, in the second place, to those cases in which this Court has defined the circumstances under which an original bill may be filed to set aside a decree for fraud, we find here again, in another form, a restatement of the rules laid down in *Randall v. Howard*, *Nougué v. Clapp* and *Graham v. R. R. Co.*

Some leading cases on the subject of original bills to set aside decrees for fraud are, probably, *Gaines v. Fuentes*, 92 U. S., 10; *United States v. Throckmorton*, 98 U. S., 81; *Barrow v. Hunton*, 99 U. S., 85; *Johnson v. Waters*, 111 U. S., 640; *Arrowsmith v. Gleason*, 129 U. S., 86; *Marshall v. Holmes*, 141 U. S., 589. In all these cases the Court emphasizes the proposition that equity will not, upon original bill, grant a rehearing of issues which have once been determined, and that where a bill to set aside a decree for fraud, fails to show that the facts, said to constitute the fraud relied on, were unknown to complainant, in time to be used in the original suit, it fails to make out a case for a second suit. Thus in *Johnson v. Waters*, the Court says:

"This court would not try over again a case already tried, nor permit the complainant to litigate matters which he had notice of, and which he had an opportunity to litigate in the probate proceedings."

In *Barrow v. Hunton*, 99 U. S., 80, 83, the Court says that such a bill must present "the investigation of a new case arising upon new facts," a phrase which is very similar to a phrase used in *Arrowsmith v. Gleason*, and approved in *Marshall v. Holmes*. In the case last mentioned, in commenting upon other cases, the Court said:

"In *Nougue' v. Clapp*, it did not appear, nor was it alleged, that the facts constituting the fraud were not, before the rendition of the decree, within the knowledge of the party seeking its annulment, or could not have been discovered in time to bring them in some appropriate mode to the attention of the court while the decree was within its control. For aught that appears, that suit was brought simply to obtain a rehearing in the Circuit Court of the United States, sitting in equity, of issues that were, or, by proper diligence, could have been, fully determined in the suit at law, in the State Court. The relief there asked could not have been granted, consistently with the rule that equity will not interfere with a judgment at law, even where the party has an equitable defense, if he could, by the exercise of diligence, have availed himself of that defense in the action at law to which he was a party. This requirement of diligence is, as it ought to be, enforced with strictness." (p. 600.)

The result of the examination of these cases shows, therefore, that where a party to a suit suffers any injury by the fraud of another party, it is his duty to ask relief, if possible, in the pending proceeding, and it is only in cases where this was impossible that any other court can have jurisdiction or give relief.

It is, therefore, part of complainant's case in setting out the facts of fraud, which constitute his case, both to allege in his bill and to show by proof, that these facts upon which his claim to relief depends, were not within his knowledge before the rendition of the decree complained of, or could not have been discovered, in time to bring them to the attention of the court, while that decree was within its control. Unless the bill contains these allegations, it states nothing more than an application to a court of equity to grant a rehearing of issues that have been fully determined.

Marshall v. Holmes, 141 U. S., 589, 600.

In *Avery v. United States*, 12 Wallace 304, this principle was applied to the case of a petition for a writ of *audita querela* to open up a judgment at law. In this case the petition alleged that the facts relied upon were unknown to the petitioner at the time the judgment was entered and his testimony supported this allegation. The court held, however, that the petitioner had failed to show that by due diligence he might not have learned the fact in time to have set up his defense in the original proceeding. "It was his business to have informed himself on the subject," the court said, and upon this ground of failure of proof the petition was denied.

In the case at bar, the bill contains no explicit allegation that the facts, upon which Mrs. Kirchoff now relies, were unknown to her at the time the Federal decree was entered. It is not probable that in the absence of such an allegation, its place could be taken by inference or any indirect conclusions from other statements. It is essential that the pleader should make a case by a positive and explicit allegation of every material fact. Mrs. Kirchoff's bill, however contains no allegation from which any reasonable inference of ignorance can be drawn. The bill states that an agreement was made in 1878, and that the Insurance Company refuses to carry out this agreement and claims to hold the land "free and discharged of any equitable interest therein on the part of your oratrix," and "gives out and pretends that no such agreement was ever made and entered into between the said company and your oratrix." The important question which is presented upon the reading of these allegations as to *when* the company first refused to carry out this agreement; and *when* it first claimed to hold the land free of any equitable interest;

and *when* it first gave out and pretended that no such agreement was made—these questions the bill does not answer. Of course the company *might* have refused to recognize the alleged agreement at any time after it was supposed to have been made. The company *might* have repudiated every obligation which Kirchoff was trying to foist upon it, at once and as soon as it knew of his claim. The allegations of the bill tell nothing whatever of the actual facts of this important matter.

We shall show in another part of this argument that all the substantial facts upon which the claim for relief depends, were, if ever, known to complainant ten months before the foreclosure decree was entered; but at this point we are considering, not the evidence, but the complainant's case as made in her bill.

This case consists of a statement of a contract, under which Mrs. Kirchoff claims an equitable interest in the property in controversy, and by which the Insurance Company was not to acquire an absolute interest at the foreclosure sale, but was to acquire that interest subject to an obligation to convey to complainant on certain terms.

Any person making such a contract, knowing that it concerned the equitable rights which were involved in the pending foreclosure suit, and that the purpose and function of the decree in that suit would be to state those rights as they existed at the date of the decree, must necessarily have expected that the contract would be recognized by the decree.

It follows, therefore, that when the Insurance Company procured the entry of a decree which failed to recognize this agreement, then, if never before, the Insurance Company had committed a breach of its obligations. It was,

therefore, the duty of the defendant in error to act at once and have that decree set aside. This she failed to do.

In the proof offered under this bill it appeared that the Kirchoffs not only neglected to set up, as a defense in the foreclosure suit, their supposed agreement with the Insurance Company, but after the decree had been entered without reference to the agreement, they lay by and permitted the sale under that decree to be had ; they permitted the Insurance Company to purchase for \$17,000, land which they insisted they had a right to buy back for \$10,000 ; they offered no objection when the sale was confirmed ; even after the filing of the petition for a writ of assistance, they failed to ask relief in the United States Circuit Court, and their only excuse is that “ *said Kirchhoff further states that his solicitors have in course of preparation, a bill in chancery, setting up the foregoing facts and asking that complainant be required to execute its undertakings in the premises, or in default thereof, that the decree herein be set aside and held for naught.*” (Rec., 107.)

Upon the authority of *Randall v. Howard*, *Nougue v. Clapp*, *Graham v. Boston, Hartford & Erie R. R. Co.*, and *Marshall v. Holmes*, we submit that the rule is established in this Court, that the Kirchoffs had no right to withhold defenses which they might have presented to the United States Court, for the purpose of making them the subject of an independent proceeding in another court. And since they had no right to reserve these defenses during the progress of the Federal foreclosure suit, they are now concluded by the Federal decree. Any proceeding in a State Court, which attempts to give them the benefit thereof, and which attempts to give to the Federal decree an effect which is different from the effect given to it under Federal law, is a review of the Federal decree.

II.

THE FACT THAT THE PROCEEDINGS IN THE STATE COURTS REVIEW THE FEDERAL FORECLOSURE IS SHOWN BY THE EFFECT OF THE DECREE OF THE STATE COURT UPON THE FEDERAL FORECLOSURE DECREE.

One of the most conspicuous features of the case at bar is the illegality and immorality which permeate the arrangement which is alleged in the bill.

The agreement which defendant in error sets up, was that the Insurance Company should proceed with its foreclosure in the United States Court, for the benefit of its debtors, the Kirchoffs, and hold the title, when acquired, in trust for them, to free the land from judgment liens of their creditors.

The manner in which the "intervening liens and incumbrances" were to have been disposed of, after they had ceased to be liens upon the property in question, is not definitely shown in the bill. In answer to the Receiver's petition for a writ of assistance, filed in the United States Circuit Court, Kirchoff, on his oath, speaking for the defendant in error, said, that the arrangement was, not that the land should be reconveyed to *Mrs. Kirchoff* after foreclosure, but that the conveyance should be made to himself, or to such person as he might name. (Rec., 107.) The present bill of complaint does not so state the agreement, and it may well be, so far as this bill is concerned, that it was the intention of the complainant to deprive her creditors of their security, merely in order that she might settle with them. The details of the proceedings are immaterial. The substantial fact is that the bill states an agreement for a fraudulent foreclosure.

The relation of mortgagor and mortgagee which subsisted between the Insurance Company and the Kirchoffs at the beginning of the foreclosure suit was to exist between them at its close, unaffected in any material particular. As between them the controversy was to be apparent, not real. The proceedings were to be limited in their effect, so as to operate against junior incumbrancers, and this limitation was to be imposed upon the Federal decree, by an agreement between the Kirchoffs and the Insurance Company, made, if made at all, long before the decree was entered.

If we assume the truth of the statements contained in the bill (Rec., 24), defendant in error was a party to a conspiracy, the purpose of which was to impose upon the United States Circuit Court and use its decree merely as a means of perpetrating a fraud.

Counsel for defendant in error have sought to establish that the agreement, upon which the bill is based, was a legal agreement, by the statement that at the time it was made, there were no judgments against Mrs. Kirchhoff, which were liens on the property. This position is ineffectual for two reasons: In the first place, because the bill of complaint alleges "that upon examination of the title to said lots, it appeared that there were certain intervening liens and incumbrances upon the same, created after the execution of said trust deed" (Rec., 24); and in the second place, because counsel for defendant in error are compelled to admit, that, at least, one of these judgments had ripened into a title, the homestead property having been sold under an execution, and a sheriff's deed issued to the purchaser. (Rec., 112, 118.)

The question, therefore, in regard to the legality of the agreement stated in the bill, is this: Whether a con-

tract for a fictitious foreclosure, to be conducted in a Federal court for the sake of cutting out the interests of third persons, is a legal contract.

This question received considerable attention in the case of *Randall v. Howard*, to which reference has been made. In passing upon the character of such an agreement, this Court, speaking by Mr. Justice DAVIS, after quoting the allegations of the bill, which in that case were substantially the same as those at bar, said:

“These allegations, stripped of their indefiniteness and vagueness, mean simply this: That the parties to this bill, in order to counteract a claim set up by other parties for a portion of the mortgaged lands, combined together, through the aid of the court, to shorten the time of sale, and to cover up the real ownership of the property.

A fraudulent agreement was entered into, to defeat, as is charged, ‘a fraud attempted against the complainants.’ If the claim set up was a fraud on the rights of the complainants, does that consideration change the character of the agreement which was made to defeat that fraud? Manifestly not. The whole complaint of the bill is that the defendant will not execute the agreement thus fraudulently made, and the object of the bill is to compel him to do it.

A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim ‘*in pari delicto potior est conditio defendentis*’ must prevail.

It is against the policy of the law to enable either party in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another. Story’s Equity, Vol. 1. Sec. 298; *Balt v. Rogers* (2 Paige, 156); *Wilson v. Watts* (9 Gill, 356).’’

In the case of *Dent v. Ferguson*, 132 U. S., 50, the same principle arose under a somewhat different state of facts. In the latter case this Court quoted with approval from its former opinion in the case of *Randall v. Howard*, *supra*, and reaffirmed the propositions there stated.

In *Connolly v. Cunningham*, 5 Pac. Rep., 473, there is a case very similar, in this respect, to the case at bar. That was a bill filed by a mortgagor against a mortgagee after foreclosure, praying for an account, redemption and specific performance of a contract to re-convey the mortgaged property. It appeared by the allegations of the bill that the mortgagor, Connolly, and the mortgagee, Cunningham, had united to conduct a foreclosure suit for the purpose of cutting off the lien of a third party upon the mortgaged land, and that after foreclosure was complete, and Cunningham had obtained an absolute title to the land in question, he refused to recognize Connolly's interest.

The court held that such an agreement was fraudulent and not enforceable, using the following language:

"It is against public policy for persons to agree or undertake to occupy the time and attention of the people's courts with pretended litigation in which there is no real controversy or no change of attitude or relation sought to be effected by the judgment. * * * But it is said that there was a real controversy to be waged with Samuel Scott, the prior mortgagee, and a substantial judgment to be taken as to his rights. But on what theory was the plaintiff, Cunningham, entitled to have him made a party to the proceeding against Connolly? On the theory that Cunningham was waging against Connolly a *bona fide* suit for actual foreclosure, to which suit Samuel Scott was a necessary party. That theory was the theory on which the court must have proceeded to adjudicate against Scott's rights. But that theory was a sham and imposition on the court, and it is very questionable whether the decree against Scott has any validity whatever. In reality, plaintiff, Cunningham, and defendant Connolly were in collusion. They really were both plaintiffs, and the Scotts were the only defendants. * * * The deceitful and fraudulent character of this agreement appears in another way. It was stipulated that Cunningham should become purchaser at the

sheriff's sale, and although it is not said that no one else should bid, it appears from the whole tenor and spirit of the agreement that the parties intended that he and no other person should be purchaser. Otherwise their substantial relationship of mortgagor and mortgagee could not be maintained unimpaired. They made it their intent and interest that there should be no fair judicial sale, but only a sham sale—fraudulent as against Samuel Scott, idle as between themselves, sham as towards the court. This fraud, going to the very substance of their contract was sufficient of itself to make it void.

Any collusive act of parties, whereby the record in a suit is made up to deceive, purposely, the court, as to the true intent and object of the suit, is a fraud. * * * Every agreement to practice such deceit is fraudulent, against public policy, and void. This court, as a chancery court, is now asked to become a party to such an agreement by approving and confirming it, and assisting appellant to the advantage he expected to get from it. We refuse the alliance. We will leave the parties where we find them."

There is, perhaps, therefore, no doubt about the proposition, that the agreement—which is stated in the Kirchoffs' bill of complaint, is not such an agreement as the United States Court would have enforced in the foreclosure suit. Mrs. Kirchoff's property was, by law, subject to the payment of her debts, and no court would relieve it of that burden. A legitimate foreclosure would divest her interest in the property, and would, as a necessary result, divest the interest of all persons who looked to her property for payment of her debts. There is no legal proceeding by which the rights of creditors can be divested and the rights of the debtor left intact.

If, then, the Federal Court would have refused to enter a decree which would operate against Mrs. Kirchoff's creditors, but not against Mrs. Kirchoff, can that effect be given to the decree by subsequent order of another

court? It must be remembered that the title derived through the foreclosure proceedings is still good against the parties holding the "intervening liens and incumbrances" mentioned in the bill of complaint. As to these persons, the decree is still susceptible of enforcement. Can it be that it is not capable of enforcement as against Mrs. Kirchoff? The only reason, that the parties holding such intervening liens are deprived of their interest in the land, is because the Kirchoff interest, through which they claim, has been divested. If, therefore, the foreclosure decree is not good as against Mrs. Kirchoff, it should not be good as against the holder of an intervening title to the Kirchoff interest, or any judgment creditor of Mrs. Kirchoff.

It follows then, that the Federal decree must stand as a whole or it must fall as a whole. The case cannot be subdivided so as to give to the Federal decree a partial operation such as that court, *if it had full control of its own decree*, would not permit.

If, in order to meet the alternatives of this dilemma, it be urged that the whole Federal decree should fall, our answer is, that the present proceeding does not seek to destroy the Federal decree as a whole. It seeks to take advantage of the Federal decree and to enforce it as against persons, interested in the "intervening liens and incumbrances," mentioned in the bill, while, at the same time, it seeks to get rid of the effect of the decree, so far as concerns Mrs. Kirchoff. The decree, which has been entered by the State Court, directs the Insurance Company to convey its title to the defendant in error, and in case of failure to make such conveyance, directs the master in chancery of the State Court to execute the conveyance on behalf of the Insurance Company. (Rec., 410.) If Mrs.

Kirchoff were to receive this deed, she would acquire a title, superior to the title acquired and held by any of her "intervening incumbrancers" prior to the foreclosure, and until the Federal decree of foreclosure had been set aside, she would have a right to use it as a muniment of her title. This, we submit, is impossible. The State Court has no jurisdiction which will permit it to modify the decree of a Federal court, nor can it enable parties to use that decree for purposes not sanctioned by the law of the court in which the decree was entered.

III.

THE FORECLOSURE DECREE OF THE UNITED STATES CIRCUIT COURT IS CONCLUSIVE OF THE MATTERS LITIGATED IN THE PRESENT SUIT.

It is not our intention to dispute the findings of the State Courts upon questions of fact. It has been decided that the Insurance Company did, in 1878, enter into the contract claimed in the bill (Rec., 305), and that the Federal foreclosure decree "was rendered, and the sale made by consent, for the purpose of clearing the different tracts of land, mentioned in the quitclaim deed from certain incumbrances." (*Insurance Co. v. Kirchoff*, 133 Ill., 368, 380; Rec., 311; 149 Ill., 536, 539; Rec., 516.)

Upon the strength of these findings, counsel for defendant in error argues that there is no question of law left in the case—that the questions at issue in the State Court, were whether, *as a matter of fact*, such an agreement as was alleged in the bill was made, and if so, whether or not, *as a matter of law*, the defendant in

error was entitled to a conveyance from the Insurance Company.

The finding that "the sale was made by consent, for the purpose of clearing the different tracts of land, mentioned in the quitclaim deed, from certain incumbrances," is a finding, either of a fraudulent agreement, or that the Kirchoffs consented to the entry of a hostile decree which would cut off all interest on their part, either legal or equitable, in the land in question—for the only legal decree, which could "clear the land" of junior incumbrances, would cut off the interest upon which these incumbrances rested.

From the statement of facts already made it has been shown that during the progress of the foreclosure suit in the United States Court, a dispute arose between the Insurance Company and the Kirchoffs, as to the effect of some negotiations which had taken place between them. The subject of the dispute was included in the subject of the foreclosure suit. *Under these circumstances there must have been some way in which the Insurance Company could have this dispute determined*, and for this purpose, in November, 1879, it offered back to the Kirchoffs the quitclaim deed which had been handed to Kendall and gave notice that it would not perform obligations which it insisted it had never assumed.

Upon this state of facts, a question of law is presented as to the effect of this action on the part of the Insurance Company. It is our contention that, thereafter at least, the foreclosure suit was hostile to the Kirchoffs' interest, and that if they had any defense to the foreclosure proceeding, arising out of their negotiations with the Insurance Company, it was their duty to have raised that defense and to have prevented the entry of an inconsistent decree.

In order to present to the Court this question of law, it will be necessary to consider the evidence sufficiently to show what the action of the Insurance Company was. The State Courts have made no findings upon the subject, and under these circumstances it is, we understand, in accordance with the practice of this Court to examine the record, to determine what questions of law are presented by the facts there stated. Thus, in *Dushane v. Beall*, 161 U. S., 513, the Court held that,

"If all the facts stated in the record before us, do not, as matter of law, warrant the conclusion at which the highest court of this state arrived upon this question, it is the duty of this court so to declare, and to render judgment accordingly."

To the same effect was the case of *Stanley v. Schwalby*, 162 U. S., 255, where the Court, in considering whether the purchaser of a title, took it with notice of an existing defect, said:

"The evidence appears to us wholly insufficient in fact and in law to support the conclusion that the attorney had any notice of a previous deed to McMillan or any knowledge of the circumstances tending to prove the existence of such a deed, that he should have considered and treated them as of any weight, or have reported them to the authorities at Washington."

The inevitable conclusion, *as matter of law*, is that the United States acquired a good and valid title as innocent purchasers, for a valuable consideration, and without notice of a previous conveyance to McMillan."

a. Assuming the existence of the contract claimed in the bill, nevertheless the evidence shows, that ten months before the decree in the Federal court, the Insurance Company notified the Kirchoffs that it refused to recognize the contract which they claimed. Thereafter, at least, the foreclosure suit was hostile to them.

We have already shown that it was an essential part of Mrs. Kirchoff's case, to allege and to prove, that the facts upon which she now relies, as the grounds for her relief, were not known to her in time to have been used in the progress of the foreclosure case in the United States Court.

This allegation is of the very substance of her case, for if the facts, which she now sets up, were known to her in time to have been used in the progress of the foreclosure suit, the defenses based upon them should have been made there, and are concluded by the decree in that case. There is no presumption in favor of the pleader which can take the place of such an allegation; on the contrary, the presumption is always against the pleader, and when the defense of a decree of court is set up, the presumption is in favor of the validity and binding force of every decree of a Superior Court having jurisdiction of the parties and of the subject-matter.

It seems, therefore, that it must be the legal conclusion from the pleadings, that the facts which are now brought forward, were known to complainant before decree in the Federal Court, and here we might very well rest our consideration of this feature of the case.

All of complainant's witnesses, however, in relating the story of the alleged agreement, have shown so clearly that the present bill contains nothing new that we desire to call the attention of the Court to this evidence.

The record places beyond dispute the fact that the company never authorized the so-called agreement, and promptly declined it upon the first information received. (Rec., 176, 222, 273; Exh., 39, 142, 144.) Had Kirchoff been led, at this time, to a point from which he

could not retire without injury? The only thing he claims to have done in pursuance of the so-called agreement, was to have executed the quitclaim deed of September 5, 1879. He does not claim to have had any defense to the notes and mortgage. If he had, the foreclosure proceedings were still pending, and his defense could have been interposed. His situation was entirely the same as it would have been had the so-called agreement never been talked of, except, possibly, for the execution of his quitclaim deed.

But this quitclaim deed had not yet been delivered. Kendall testified that he told Kirchoff he "would take his deed, would write to the company in regard to the conveyance back to him; in the meantime I would not put his deed on record nor take an advantage of him, intending to keep the matter open, so far as I can recollect now, until he had definitely settled the terms of his contract with the company, if he had any." (Rec., 158.)

Kirchoff nowhere attempts to deny this. It is the only possible conduct on the part of Kendall consistent with the whole current of events, as disclosed by the record.

Kendall's letter of November 1, 1879, was promptly met by the company's explicit refusal to accept the proposition which it contained. Kirchoff was immediately informed of this refusal, and given an opportunity to withdraw the deed. Kendall says:

"I know I had an interview with him (Kirchoff); I recollect now, after the receipt of that letter, and probably very soon after the receipt of it, in my office, at which interview the matter was talked over, *and he was fully advised of the decision of the company.*" (Rec., 152.)

"I think I sent for Kirchoff on receipt of that letter; I know I had an interview with him after the receipt of the letter, very soon after, and very likely on the same day. I think I tendered Kirchoff his deed back again or

at least I gave him an opportunity to withdraw the deed if he did not wish to deliver it; but he concluded to deliver the deed, insisting that he had a contract and would stand on his agreement with the company. I know I never recorded that deed without having an understanding in reference to it, and I do not think it was recorded by mistake." (Rec., 159.)

Neither is this denied by Kirchoff; on the contrary he expressly admits the substance of it when he says:

"I cannot remember whether they ever tendered the quitclaim deed, which we had executed to the company, back to me or not; there was some talk, but I said I would stick to my contract to give them a quitclaim deed and take the homestead. * * * I cannot remember whether he offered the deed back to me, but I remember there was some talk about it, and I said it was settled." (Rec., 297.)

Also:

"Mr. Kendall said that he had answer that they wanted more money. I answered him that I stuck to my contract that I had made." (Rec., 41.)

If, after this testimony, any doubt remains of Kendall's having communicated the decision of the company to Kirchoff, it certainly is silenced by a circumstance wholly inconsistent with any other view of the facts. It will be remembered that Mrs. Kirchoff's and Mrs. Diversey's deeds were executed on the same day, September 5, 1879. The Diversey deed was recorded seven days thereafter, September 12, 1879. (Rec., 130.) But the Kirchoff deed was withheld from the record. The motive naturally suggested for such action, and the only one given by any witness in the cause is stated by Kendall in substance as follows:

"When I received the deeds from Mrs. Kirchoff and Mrs. Diversey I recorded the Diversey deed and held the Kirchoff deed in my office until I should hear from the

company in regard to the conveyance to be made to Kirchhoff." (Rec., 149.)

Also :

" I think I stated the matter somewhat in this way to Kirchhoff at the time ; that I would take his deed, would write to the company in regard to the conveyance back to him ; in the mean time would not put his deed on record, nor take any advantage of him, intending to keep the matter open, so far as I can recollect now, until he had definitely settled the terms of his contract with the company, if he had any." (Rec., 158.)

No other reasonable motive for withholding the Kirchhoff deed can be suggested. Now, is it reasonable to suppose that having withheld this deed from the record for two months, because he did not yet know if the company would approve of a sale to Kirchhoff, Kendall would immediately put it on record, when the company disapproved of it, unless he had some understanding with Kirchhoff that it was to be delivered notwithstanding such disapproval ? What motive had Kendall to withhold the deed, pending the company's approval, that he did not have after the company's failure to approve ? He apprehended that the company would not assent to Kirchhoff's proposition, and, *therefore*, kept the deed so it could be returned. Are we to believe that as soon as he was certain that the proposition would not be accepted, he without any further understanding, put the deed beyond Kirchhoff's control ? His having communicated the company's decision to Kirchhoff, before recording the deed, is the only assumption of fact consistent with either his or Kirchhoff's recollection of the events, or with the unchallenged motive upon which his whole conduct with Kirchhoff had been based.

Here, then, whatever may have been his thoughts on

the subject before, Kirchoff was explicitly advised that the so-called agreement had never been authorized by the company, and did not receive its consent now. A counter-proposition was offered him. He could either have accepted that, and thus have had an agreement to which the company *was* a party, or withdrawn his quitclaim deed, and thereby have been placed in precisely the situation he was before the deed was executed.

But Kirchoff had a good reason for not withdrawing the deed. The entire property mortgaged was not worth the entire mortgage debt. A year later, at the foreclosure sale, the two lots appraised in 1879 at \$10,000 were bid off at \$17,000, in order to bring up the bids to the amount of the debt. The quitclaim deed released both the defendant in error and himself from the danger of a deficiency decree. He could not afford, therefore, to withdraw the deed. Is it possible that, but for this other motive, he would not have done so? Can the Court doubt, but for this release from the entire indebtedness being also at stake, he would have withdrawn his deed? Especially so, if he were anxious to repurchase the homestead, as he now professes to have been?

The practical question Kirchoff then had to decide was, whether he would withdraw the deed and lose the benefit of the release, or leave the deed, and thereby drop the matter of repurchasing the homestead, except upon the terms of the counter-proposition submitted. He was not willing to do either. He chose to leave the deed, secure the release, *and take his chance of enforcing the so-called agreement, notwithstanding its rejection by the home office.*

It was that chance he took to the State Court for enforcement.

The defendant in error was certainly unfortunate in having involved her homestead in an indorsement upon her husband's debts. It is a misfortune, however, in which she has many fellow-sufferers. It came principally from that common financial calamity, under whose hand promised values shrank into hopeless depreciation. The wards, whose trustee this plaintiff in error is, were among those who had also to weather the storm.

Her misfortune is no reason why the law should be changed. When she came face to face with the Insurance Company she was given a choice to retrace any steps taken under a misconception of her relation to the transaction, or to go forward to a new and authentic understanding. She and the plaintiff in error thus stood upon an equal footing. Her choice to do neither, but to force the company into an agreement to which it never assented, is not, we submit, a clean claim to bring into a court of equity for enforcement.

In the argument filed by the defendant in error in the Supreme Court of Illinois, it was insisted that after the delivery of the quitclaim deed, the representatives of the company continued to assure Mrs. Kirchoff that the rejected proposition would be carried out. We do not see how this, if true, could attach any liability to the Insurance Company. Kirchoff then knew that the representatives of the company were without authority in that respect. It is nowhere hinted that after the letter of November 5th they received, or professed to receive, any further authority from the home office.

Kendall says (Rec., 114) that he did nothing after that time with reference to this agreement.

Warfield says that when Kirchoff came to him he was sent to Kendall for particulars.

Defendant in error had, immediately upon receiving the refusal of the home office, elected to deliver the deed and take her chances. She could not improve these chances by merely procuring new assurances from the discredited representatives. Neither would it have been good faith on her part to have relied upon any such assurances.

But it is plain, from the whole record, that no such promises were given her. In the light of the reports and correspondence, the making of such promises is simply incredible, except upon the theory that Warfield and Kendall were wantonly dishonest and disloyal. Have the kindness, though tedious, to read the letters of the company to Kendall and Warfield of November 5, 1879, rejecting the offer. (Rec., 273; Ex. 143, 144.) Follow that with the letters of November 8th and November 26th of Kendall and Warfield, respectively, to the company. (Rec., 223; Ex. 40, 41.) The correspondence then proceeded: December 3d DeWitt writes to Warfield to put Kirchoff out of the house if he does not pay his rent. (Rec., 274; Ex. 147.) December 6th Warfield changes the valuation on the homestead, without referring to the so-called agreement. (Rec., 224; Ex. 43.) February 5, 1880, Warfield is again instructed to turn Kirchoff out. (Rec., 277; Ex. 155.) February 7, 1880, Warfield replies:

“This matter has been placed in an attorney’s hands for collection, but I hardly think he will succeed; we shall probably have to get an order from the court to put him out.” (Rec., 234; Ex. 53.)

May 7, 1880, the home office again brings to Warfield’s attention Kirchoff’s unpaid rent. (Rec., 278; Ex. 169.) To this letter, May 28, 1880, Warfield replies that “about the time the president was here last, I gave the matter to

Wheeler, and he succeeded in getting \$100 out of Kirchhoff. Since then the Best Brewing Company have closed up Kirchhoff's business, and he is out of funds, and likely to remain so. I have written Messrs. Kendall and Bliss to get an order from the court to either pay the rent or vacate the premises." (Rec., 241; Ex. 67.)

May 31, 1880, Kendall writes that he has "received a letter from Warfield, as receiver, saying he was unable to collect amount now due from premises occupied by Kirchhoff, and requesting that measures be taken to eject him. Shall make application to court for assistance as soon as national convention is over, court having adjourned during the meantime." (Rec., 241; Ex. 68.)

June 7th, Warfield again writes:

"Referring to matter of rent due from Kirchhoff for house on Rush street, have to say that he has to-day paid me \$80, and promises to pay \$60 per month, commencing on the 20th inst., until the account is squared. Have not much faith in his promise, and had it been earlier in the season would not have accepted the money; but under the circumstances thought it best to get the \$80, and if the \$60 is not forthcoming on the 20th, will immediately proceed to get possession." (Rec., 242; Ex. 69.)

July 12th, Warfield writes that he has instructed Kendall to get Kirchhoff out, "and as soon as he does, I will rent the premises to somebody who will pay more promptly." (Rec., 243; Ex. 73.)

Can the court believe that during the period of these letters the representatives of the company were assuring Kirchhoff that the so-called agreement would be carried out? It is plain that the company did not change its attitude toward the proposition after November, 1879. Did Warfield and Kendall reaffirm the so-called agreement, in the face of the then known wishes and instruction of the company?

Warfield says he told Kirchhoff the foreclosure would go on and sent him to Kendall for particulars. (Rec., 70.)

Kendall says he did nothing after the receipt of the letter of November 5, 1879, in reference to the alleged agreement with the Kirchoffs except to notify Kirchhoff of the company's decision. (Rec., 114.)

The assumption that they did is not supported by any tangible testimony. Kirchhoff's reference to it is as follows :

"After we delivered the quitclaim deed they foreclosed; I asked Warfield what they meant, and he said I need not be afraid; it was better for us; and he told me to see Kendall. Kendall said he thought there were some judgments against the lots, and to make it safer they had to do it; it would be better for us, and we should have the deed after that. Mr. Kendall said it would not affect the contract, and would be better for the property." (Rec., 39, 40.)

"After we gave the deed, September 14, 1879, I found out they wanted to foreclose. Mr. Warfield told me it was all right, and that Kendall would explain." (Rec., 47.)

From this it will be seen that whatever assurances were given came from Kendall.

Warfield says :

"After the Kirchhoff deed had been delivered and recorded, Mr. Kendall found that there were certain objections to the title of the property which could be removed by foreclosure. I notified Kirchhoff that the proceedings would go on, in order to perfect the title, and referred him to Kendall for particulars. As I remember it now, I told Mr. Kirchhoff we would have a deed from the Insurance Company executed, and the mortgage back, signed. It is my impression that Kendall prepared the deed and sent it to the company for execution. I did not think it would be necessary to wait until the title was perfected in the Insurance Company by a foreclosure before the deed was delivered." (Rec., 70, 71.)

As Kendall sent to the company for execution but *one* blank deed for conveyance, this conversation of Warfield

with Kirchoff must have occurred *before* the receipt of the company's letter rejecting the proposition, and is, therefore, pointless. But whatever the conversation was, or whenever it occurred, Warfield confirms Kirchoff that he was sent to Kendall for particulars.

It must not be forgotten, either, that this testimony of Warfield was given before he saw the correspondence between the company and himself, and when the whole transaction lay in his mind, in the confusion produced by the lapse of seven years.

Kendall's recollection upon this point appears in the record as follows :

Q. Were you ever instructed by the company or Mr. Warfield to eject him (Kirchoff) from the property?

A. I think I was requested by Mr. Warfield to get possession for him as Receiver of the property occupied by Kirchoff, because he had failed to pay rent, as stipulated in the lease ; and I think I intended to have done so, but I do not think I ever got as far as to make any application to the court for assistance in the matter.

Q. Did Kirchoff ever inquire of you why you were proceeding with the foreclosure?

A. Yes, he did on one occasion.

Q. What did you tell him?

A. I told him that certain complications in the title that I had discovered since the delivery of his quitclaim deed, pertaining to the homestead lot, made it necessary in my opinion, to proceed with the foreclosure, get a decree and have it sold.

Q. Was any reference made to this agreement at that time?

A. Well, yes ; *I think Kirchoff had something to say about his buying back that property*, with reference to the effect the foreclosure proceedings would have : I did not discuss that matter much with him ; *I think I told him that it would not make any difference.* I recollect explaining to him that, in any event, it would be better for the title that it should be foreclosed in that way, to get

rid of this intervening encumbrance; and until that was done the company could not give a good title to it, nor take a good title back under a mortgage.

Q. You say you told him at the time, that the foreclosure would have no effect on the bargain that had been made?

A. I think I told him substantially that.

Q. And did you give him the idea at the time that the foreclosure proceedings would improve the title, and that it would be for his benefit as well as for the company's?

A. *I did, in the event that he became the purchaser.* (Rec., 159, 160.)

The key to the correct interpretation of this conversation is in the attitude, or relation, of Kendall and Kirchoff to each other at that time.

What was the attitude of Kirchoff and Kendall to each other at the time of this conversation? Kendall had previously informed Kirchoff that the so-called agreement was declined by the company, and that he could withdraw his deed. Kirchoff, with his eye upon the effect of the deed as a release, had declined to do so; but on the contrary, leaving the deed, announced his determination to stand by the so-called agreement, notwithstanding its rejection by the company. The lines to be pursued thereafter by each of them were clearly marked. Kendall would go on with the foreclosure, Kirchoff would insist upon the agreement. When, therefore, Kirchoff asked if the foreclosure would affect his agreement, the only answer Kendall could give would be in the negative. For, if the agreement had a good basis in law and in fact Kirchoff had a right to set it up in the foreclosure proceedings, and the decree would respect and enforce it. Kendall was careful, however, to tell him that the foreclosure proceedings would be a benefit to him only "in the event that he became the purchaser."

Was there anything in this conversation, reported vaguely and indefinitely to us by an adverse witness, which convinces the Court that Kendall, in the very teeth of the company's instructions, intended to bind the company *anew* to the so-called agreement? If so, he was guilty of nothing less than treason against his principal. Was there anything in the conversation calculated to mislead Kirchhoff? He knew the company's previous attitude and his own position with reference thereto. He had no right to infer from Kendall's telling him the foreclosure would not affect his contract, that such contract was renewed. Knowing it had been repudiated once, he cannot thus carelessly become the beneficiary of the rule of estoppel, and force a contract that was never made.

b. It was the duty of the Kirchoffs, at once upon the repudiation by the Insurance Company of the contract claimed, to interpose their defense in the foreclosure proceeding, if they had any. Having failed to do so, they are precluded by the Federal decree from setting up claims which existed before that decree.

It is quite clear that in the course of the foreclosure in the United States Court a dispute arose between the Insurance Company and the Kirchoffs, as to whether any adjustment of the matter at issue between them had been made; the Kirchoffs on the one hand claiming the existence of a contract, and the Insurance Company on the other hand denying that any such contract had been made and refusing to perform obligations which it insisted it had not assumed.

Under these circumstances there must have been some course, open to the Insurance Company, by which this dis-

pute could be adjudicated. The matters involved in the dispute were the very matters involved in the Federal foreclosure suit, and concerned the title which was to be derived from the foreclosure sale; the terms upon which redemption was to be allowed and the parties against whom the decree was to operate. The Insurance Company claimed the right to sell the property at the foreclosure sale, free from any interest of the Kirchoffs, and claimed the right to limit redemption, by the mortgagors, to the statutory period. The Kirchoffs, on the other hand, claimed the right to compel the Insurance Company to purchase at the foreclosure sale, and when it had purchased, to hold the property in trust for them upon the terms of the agreement.

What course was open to the Insurance Company to settle this dispute, except the course which it actually followed in this case?

The Insurance Company did not procure the entry of a foreclosure decree by any misleading assurance; the Kirchoffs knew that it denied the existence of any agreement between them; they knew that if their contract was a lawful contract, it could have been embodied in the foreclosure decree. When, therefore, the Insurance Company applied for and procured the entry of a decree inconsistent with the agreement claimed, this very act was an adverse, hostile act, and was the fitting termination of a year of hostile foreclosure proceedings.

It is the argument of counsel for defendant in error that "the perfecting title by the foreclosure proceedings was part of the agreement," and it is argued that the agreement claimed would not have operated as a defense to the entry of a foreclosure decree, for the reason

that the agreement contemplated the entry of such a decree.

A sufficient answer to this is, that the agreement claimed did not contemplate the entry of such a decree as was actually entered. The agreement would not have been a defense in the foreclosure proceeding, in the sense that it would have prevented *any* decree of foreclosure from being entered, but if the agreement was a lawful one, it would have been a defense against the entry of any decree which would give to the Insurance Company rights, which were inconsistent with its rights under the agreement.

Of course, assuming that the agreement was actually made, it is very easy to see why it could not have been brought forward to the court or embodied in the decree. The benefit which Mrs. Kirchoff expected to derive from the foreclosure, as disclosed by the bill, was, that she would get her property out of the way of her creditors without injury to herself.

If, therefore, she could have found any court sufficiently complaisant to lend its records to such a purpose, its compliance would have been ineffectual, for a statement in the decree of an interest remaining in Mrs. Kirchoff, would have exposed this interest to the rights of her creditors, and have defeated the very purpose sought.

We have touched upon this subject elsewhere. The fact to be noted here is that the Kirchoffs did keep silence about their supposed agreement for more than a year. They let a decree go against them which was inconsistent with the rights which they are now claiming; they waited until the period of redemption allowed by the decree had expired, and until the deed had been delivered to the In-

urance Company, and then they set up in another forum the claims that they could have presented, but did not present, to the United States Court.

There can be no doubt that a decree of a court of competent jurisdiction is binding upon all parties to the proceeding in which it was entered, as to all matters actually determined, and as to all other matters which might have been raised and determined in the case.

A person having a good defense is not permitted when sued, to keep silence, let a judgment go against him, and then raise his defense in some other proceeding or in some other forum.

It follows, therefore, that as soon as the Insurance Company repudiated Kirchoff's claim on the 5th of November, 1879, it was then complainant's duty to at once set up her rights in the foreclosure proceedings, if she had any, and failing to do so, she is estopped by the Federal decree from now setting up in the State Courts claims which existed before the entry of that decree.

That the Federal decree is, under such circumstances, conclusive and binding, is, we believe, established by the following cases :

Dowell v. Applegate, 152 U. S., 327.

Dimock v. Revere Copper Co., 117 U. S., 559.

Nougué v. Clapp, 101 U. S., 551.

Case v. Beauregard, 101 U. S., 688.

Cromwell v. County of Sac, 94 U. S., 351.

Aurora v. West, 7 Wall., 82, 102.

Jones v. Vert, 121 Ind., 140.

May v. Coleman, 81 Ala., 325.

Speck v. Pullman Co., 121 Ill., 33.

- Adan v. Mergentheim*, 113 Ind., 303.
Caldwell v. White, 77 Mo., 471, 473.
Shelbina Hotel Ass'n v. Parker, 58 Mo.,
 327.
Mally v. Mally, 52 Iowa, 654.
Bailey v. Bailey, 115 Ill., 551, 557.
Rogers v. Higgins, 57 Ill., 244, 247.
Harmon v. Auditor, 123 Ill., 122.
Stickney v. Goudy, 132 Ill., 313.

In *Mally v. Mally*, 52 Ia., 654, we find a case very similar to the one at bar.

In that case the plaintiffs brought an action for the possession of certain real estate, title to which they had obtained under the foreclosure of a mortgage. In defense of the proceedings the defendants, who had been the mortgagors, set up a written contract which they alleged had been made with the mortgagor prior to the foreclosure. This contract provided for a life lease on a portion of the land in question, to Christine Mally, one of the defendants and the wife of the other defendant, and in it other concessions appeared to have been made by the mortgagee for the benefit of the mortgagors. It appeared that these claims were not set up in the original foreclosure proceedings until after the judgment of the court was announced. Judgment of foreclosure was entered against the defendants, the property was bid in by the mortgagee and deeds regularly issued as in the case at bar. The action above referred to was then brought, by the parties holding sheriff's deeds, for possession. Judgment was rendered for the plaintiffs and the defendants appealed. The Supreme Court of Iowa, in its opinion in this case says:

"The defendant insists that the plaintiffs are not entitled to the immediate possession of the property because of the provisions of the written contracts set out in the answer and the amendment thereto. The plaintiffs in the foreclosure suit prayed for an unconditional foreclosure of the mortgage. *The decree rendered is an absolute one, accompanied with the usual incidents, and to be followed by the usual consequences of an absolute foreclosure. It authorized a sale, to be followed, in the absence of redemption, by sheriff's deed, entitling the purchaser to immediate possession. Such a sale has been made, and such a deed has been executed. If any facts existed at the time of the foreclosure, under which the plaintiff would not have been entitled to an absolute decree of foreclosure, these facts constituted pro tanto a defense to the plaintiff's action, and should have been pleaded as such in the foreclosure proceeding. These written contracts constituted such partial defense, or they did not. If they constituted such partial defense, they should have been set up and relied upon in the foreclosure proceeding, and cannot be made available now. Hackworth v. Zollers, 30 Iowa, 433; Dewey v. Peck, 33 Iowa, 242; Lawrence Savings Bank v. Stevens, 46 Iowa, 429; Collins v. Chantland, 48 Iowa, 242.*

If these contracts did not then evidence a condition of things which would have prevented an absolute foreclosure, they cannot now be set up, to deprive the plaintiffs of the benefits of the absolute foreclosure, which they have obtained.

The defendants did offer to set up the contract set out in the original petition as a defense in the foreclosure proceedings, but not until after the court had announced its judgment in the case. The court refused to allow the amendment as coming too late. It was clearly within the judicial discretion of the court to refuse to allow the amendment under the circumstances disclosed; and if it were not, the decision of the court, not having been appealed from, is conclusive upon the defendants. In any view of the case the written agreements do not now constitute a defense to the plaintiffs' action."

The opinion of this court in the case of *Dowell v. Ap-*

plegate, 152 U. S., fully sustains this proposition. That suit involved the title to a forty acre tract of land, which Dowell claimed under a decree of the Federal court, and a master's deed issued under that decree. The suit was brought in a state court of Oregon by Daniel W. Applegate for the purpose of obtaining a decree enjoining Dowell from asserting any title or claim by virtue of the latter's deed under the decree of the Federal court to the tract of forty acres which had previously been conveyed to plaintiff Applegate by William Applegate. The bill admitted that the tract of land in controversy was embraced in the deed made by the Master to Dowell, averring that a conveyance by William Applegate to Daniel W. Applegate was prior in time to the commencement of the suit in the Federal court, and that its validity was not put in issue or determined by the decree of that court. The defendant, Dowell, answered, basing his claims upon the decree of the Federal court and the sale under it at which he purchased. This court in its opinion, after holding that the decree of the Federal court, relied upon by Dowell, could not be treated by the state court as a nullity, said :

“Upon what principle can it be held that that decree being unmodified and unreversed, does not conclude the parties to the suit in which it was rendered, in respect to the liability of the lands described in it for the demands of Dowell as ascertained and settled by the court? It is said that the deed of October 8, 1874, under which Daniel W. Applegate claims forty acres, was not distinctly put in issue by the pleadings or determined by the decree. But its validity was involved in the larger question presented by the pleadings as to the right of Dowell to subject to his demands the interest of Jesse Applegate in all the lands referred to—those covered by donation claim number 38, and those not within that claim. The decree directing the

sale of all the interest of Jesse Applegate in the 121.55 acres on the 1st of January, 1869, was an adjudication, as between Dowell and the defendants in that suit who asserted title to those lands, that no claim asserted by either of them could stand against the right of Dowell to have those lands sold.

It is disclosed by the present suit that when Daniel W. Applegate answered Dowell's bill he held the deed of October 8, 1874. If Daniel W. Applegate became, when taking that deed, a *bona fide* purchaser of the forty acres of land now in dispute, and if the title so acquired was superior to Dowell's right to have that land sold for his demands against Jesse Applegate, it behooved him to assert that title in defense of the suit brought against him. The very nature of that suit required him to assert whatever interest he then had in the lands or any part of them that was superior to any claim of Dowell upon them, whether by judgment liens or in any other form. So far from pursuing that course—he forebore purposely, as may now be inferred—to claim anything in virtue of the deed of October 8, 1874, and long after the decree under which Dowell purchased he comes forward with a new, independent suit, based alone upon that deed, as giving him a superior title. His object is—certainly the effect of this suit, if it be sustained, will be—to retry the issues made in Dowell's suit, so far as they involved the latter's claim to have the forty-acre tract subjected to his demands. The decree of the Federal court was an adjudication, as between all the parties to the suit in that court, that Dowell was entitled, in satisfaction of his claims against Jesse Applegate, to subject to sale all the lands his bill sought to reach, which the decree directed to be sold. *And that decree, never having been modified by the court that rendered it, nor by this court upon appeal, necessarily concludes every matter that Daniel W. Applegate was entitled, under the pleadings, to bring forward in order to prevent the sale of the lands claimed by him, by whatever title.*

Having remained silent as to the deed of October 8, 1874, and having allowed the suit in the Federal court to proceed to final decree upon the question as to whether the lands described in the bill could be subjected to

Dowell's demands—which description included the forty acres here in dispute—and having been defeated upon that issue, and the decree having been fully executed, he cannot have the same issue retried in an independent suit based solely upon a title that he was at liberty to set up, but chose not to assert, before the decree was rendered."

In the case of *Jones v. Vert*, 121 Ind., 140, the court says:

"It is undoubtedly true that a judgment in a foreclosure suit, or in a suit to quiet title, is conclusive of any claim or title adverse to the plaintiff in that case as against all who were made parties; and this is so whether the adverse interests or titles of the defendant are specially set up or not."

In *May v. Coleman*, 84 Ala., 325, it is held that:

"When a pending suit is compromised, unless it is brought to the attention of the court before the final decree, the parties will be concluded and estopped from setting up a compromise thereafter. A supplemental answer is the proper mode to bring the compromise and settlement before the court, on which to try the issue thus presented."

IV.

THE DECISION OF THE UNITED STATES COURT UPON THE APPLICATION FOR A WRIT OF ASSISTANCE IS CONCLUSIVE OF THE PRESENT CASE.

In the course of the proceeding in the Federal Court a Receiver of the mortgaged property was appointed, and by him a lease of the property in controversy was made to the Kirchoffs. It is claimed in the present case that there was an agreement that all rent paid by the Kirchoffs to this Receiver should be applied as part of the redemption money provided for in the alleged agreement to redeem. The lease itself contained no such provision

as to the application of the rents, and the Kirchoffs after several payments of rent refused to pay more. Thereupon the Receiver filed his petition for a writ of assistance, and Mrs. Kirchhoff, acting by her husband (Rec., 24), who was her agent throughout all these proceedings, filed her answer, setting up the agreement in question.

This answer makes no reference to the terms of an agreement touching the application of the rents. It did, however, set up the agreement for redemption, and asked that the writ of assistance be denied. No application was made at this time for any order modifying the decree of foreclosure or setting it aside. This relief, the answer alleges, Mrs. Kirchhoff proposes to seek, her solicitors "having already in course of preparation a bill in chancery setting up the foregoing facts and asking that complainant be required to execute its undertakings in the premises, or, in default thereof, that the decree herein be set aside and held for naught." (Rec., 107.)

The matter presented to the Federal Court upon the hearing of this petition was precisely the question which was litigated in the State Courts of Illinois—whether the Insurance Company had made the agreement claimed, and what effect, if any, should be given to that agreement. In Kirchhoff's answer to the Receiver's petition, which the present bill alleges to have been Mrs. Kirchhoff's answer, he set up every claim made in the present suit. It is true that all the Receiver asked for was that possession of the property be delivered to him, but the question of possession involved the question as to the existence of the agreement under which the Kirchoffs claimed. Upon this answer, setting up the whole agreement, which is now relied upon in this case, the Federal Court decided against Mrs. Kirchhoff, and the writ of assistance was issued.

The United States Court had jurisdiction to pass upon this question and it did pass upon it. It ordered that the Kirchoffs deliver possession, and they were ejected from the premises. This was done before any deed was issued to the company on the sale had under the decree in the Federal court, and it was also after the company had, by Kendall, its attorney, advised the Kirchoffs that the company would not sell back the homestead at the Rees valuation. The court ousted the defendant in error because she had no rights. The court would not have ejected her if it had found that she was there under a lawful contract of purchase, and that the Kirchoffs had executed their quitclaim deed in part performance. The court would not have ousted them if it had found that the agreement provided that the Kirchoffs should hold possession, and that the rent should be credited upon the redemption money. These facts being found, the court would have kept them in possession. The determination of these facts is the decision of questions necessary to the decision of the whole case. In other words, the State Court, when it heard the present bill, and when it decided the complainant's rights upon that bill, necessarily decided upon the same question which had already been passed upon by the Federal court. It is elementary that a decree is *res adjudicata* between the same parties and privies and in reference to all questions necessarily involved in that decision. This proceeding is between the same parties. The same question arose in that case that arises in this case. The property was still in the hands of the Receiver of the United States Circuit Court, and, under such circumstances, "nothing can be plainer than that any litigation for its

possession must take place in that court without regard to the citizenship of the parties."

Minn. Co. v. St. Paul Co., 2 Wallace, 632.

Freeman v. Howe, 24 Howard, 450.

Randall v. Howard, 2 Black., 585.

The argument that this judgment was not conclusive in the present proceeding because "Neither of the parties to this case was a party to that proceeding," is without foundation. It is true that the answer to the Receiver's petition was signed by Julius Kirchoff, but it is also true that the bill of complaint in the present case alleges in terms:

"That thereupon *your oratrix*, through her said husband, resisted said application for said writ of assistance, and set up, as defense to the application of said receiver, an answer setting forth in substance the aforesaid agreement between *said company* and your oratrix, but *said company*, through its solicitors employed in said suit, supported the application of said receiver, and wholly disregarded its agreement with your oratrix, and procured the order of said court for the assistance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead."

V.

THE FEDERAL QUESTION IS CONTROLLING. NO OTHER QUESTION IS INVOLVED WHICH IS DECISIVE OF THE CASE.

During the progress of this litigation, counsel for the defendant in error have argued alternately, that their bill is a bill to redeem, or that it might be sustained as a bill for specific performance of a contract. The two theories

are inconsistent with each other. When counsel proceeded on the theory that they were seeking the relief of redemption from a mortgage, they were confronted with the Federal decree. When they attempted to establish a case for specific performance of a contract, they were met not only by the Federal decree and the question of *res adjudicata*, but also by the Statute of Frauds. Having avoided the last named difficulty, on the ground that the bill was a bill for redemption, we shall not be surprised, since this obstacle is out of the case, to see them fall back to the position that the case is one for the specific performance of a contract; that the State Courts had exclusive jurisdiction to enforce such a contract; and that therefore this Court has no jurisdiction to review the question.

To such a proposition the record, when taken as a whole, is a complete answer. For it shows,

First. That the pleadings make out no such case.

Second. That the evidence makes out no such case.

Third. That the relief granted by the decree complained of was redemption and not specific performance.

When the bill was filed in 1882, a claim was made of the right to the specific performance of the contract. In 1887 the bill was amended and made to include the prayer for redemption. The prayer in the amended bill was based substantially on the same allegations as in the bill originally filed.

The agreement claimed was an agreement by which complainant was to be allowed to redeem from the trust deed; and while this prayer for relief asked alternately for redemption in accordance with the terms of the agree-

ment, and that the defendant might be compelled to perform the said agreement, the specific performance which was asked was the specific performance of an agreement to redeem. No other agreement was mentioned or referred to in the bill.

Among other defenses to this bill the defendant set up the Statute of Frauds, and the defense was sustained. In the trial court Judge TULEY, in his opinion dismissing the bill, said :

"I am satisfied that, under the authorities, I can give no relief in this case, either as a bill for specific performance, or as a bill to redeem, or other relief whatever."

From the decree dismissing the bill, complainant appealed directly to the Supreme Court of Illinois, and on this appeal, Mr. Justice SCHOLFIELD, speaking for the court, said :

"If the complainant were to have a decree to all she shows herself entitled, it could only be that she be allowed to redeem pursuant to the terms of the agreement."

128 Ill., 199 (203).

The first appeal was dismissed by the Supreme Court on the ground that a freehold was not involved, and was next considered by the Appellate Court on a writ of error. In deciding the case the court said :

"The complainant filed her bill to redeem in June, 1882. The lots she was to redeem and the principal sum she was to pay, as well as the rate of interest, are definitely fixed by the agreement. The time at which the interest was to begin and the amount and time of payment of the installments are left uncertain. *But this is not a bill for specific performance.*" (Rec., 317, 318, 400).

33 Ill. App., 613.

The Supreme Court, on the appeal from the judgment of the Appellate Court, begins its opinion with this significant statement :

"This was a bill in equity brought by Elizabeth Kirshoff * * * against the Union Mutual Life Insurance Company to redeem (certain property) to which the company acquired title under a quitclaim deed from the complainant and her husband, and under certain foreclosure proceedings in which she, her husband and others were defendants." (Rec., 305.)

After discussing the evidence and holding that the agreement claimed was one under which the complainant was entitled to redeem, the court said :

"We have said nothing in reference to the argument that this is a bill for specific performance and hence falling within the Statute of Frauds, *as we have not regarded it as a bill of that character.*" (Rec., 305, 311.)

133 Ill., 371, 380.

It will be seen, therefore, that the Supreme Court of Illinois did not rest its judgment upon the proposition that the proper relief in the case was the specific performance of a contract ; that court expressly said that it did not consider the case as one of that character. On the other hand, the court states in substance that it *does* rest its judgment on the ground that the bill and the evidence makes out a case of redemption, and proceeds to explain the manner in which such redemption should be allowed.

But aside from this, it must be admitted that the bill is either a bill for specific performance or a bill for redemption. It cannot be both.

Complainant has taken the benefit of the decisions of the State Court and has avoided the defense of the Statute of Frauds by insisting that the present bill is not a bill for specific performance of a contract.

Can she be permitted in this Court to abandon this position, now that the Statute of Frauds is out of the case, and attempt to sustain the jurisdiction of the State Courts and exclude this Court from taking jurisdiction of this writ of error, upon the ground that her bill is a bill for specific performance?

It necessarily follows that the ground covered by the present case was completely covered by the previous decree of the Federal Court. Every claim presented to the State Court in this suit had either already been presented before the Federal Court in the foreclosure suit, or should have been so presented. The larger issue of whether the Insurance Company in that suit had the right to the absolute foreclosure of its mortgage, as against all the rights of the defendants to the suit, in that property, included every issue that could be made in the present case, and when the State Court undertook to grant relief to the complainant in this suit, that court failed to give to the Federal decree the effect to which it is entitled. And we again submit that this is the controlling question in the present case.

In conclusion there are two or three matters which we would like to suggest to the Court without extended argument.

We have already referred to the essential immorality which pervades the plaintiff's claim. We desire now to call the attention of the Court, briefly, to the character of the testimony advanced in support of the claim.

All the witnesses for the complainant have a lively interest in the subject-matter of the suit. Kirchoff, if not actually the party in interest, was at least the husband of

the complainant and her agent, largely to be benefited by a successful result. Warfield and Kendall were both discharged employes of the Insurance Company, and so far at least as Warfield was concerned, relations with the company were far from friendly (Rec., 72, 73), while on the other hand, Julius Kirchoff was at the time the testimony was taken in this suit, in close business relations with him. (Rec., 73.)

So far as concerns the former employes, it is perfectly clear upon the record, that if their testimony in this case is true, their letters and reports to the Insurance Company were not true, and it is equally clear that if their letters and reports were true, their testimony in this case, so far as it supports the alleged agreement is utterly false.

Both Kendall and Warfield deny that they personally made the contract which the Kirchoffs claim.

Kendall testifies :

"Mr. Kirchoff made some arrangements through Mr. Warfield, *I think*, the financial agent of the company, to redeem his homestead. * * * *These negotiations were not conducted by me.* I was only advised of them as they were going on, by Mr. Warfield, and by conversations with Kirchoff." (Rec., 109, 110.)

Warfield testifies :

"Personally, as agent of the company, *I did not make the agreement heretofore testified to*; what I did was to submit to the Kirchoffs propositions, as propositions coming from the company. Whatever I did in the matter was communicated to the company or its officers." (Rec., 91, 92.)

It should also be borne in mind that Mr. DeWitt, the president of the Insurance Company, during the period of all these alleged transactions, by his testimony in this

case, emphatically denies that he had any conversation with Warfield or Kendall in relation to this alleged agreement or that any such proposition was communicated to the company until he received the letter from Kendall of November 1, 1879, in which the draft of the proposed deed to the Kirchoffs, for the homestead lot, had been sent by Kendall to the company. He also denies that any such proposition was authorized by the company. (Rec., 174-178.)

When we come to Kirchoff's testimony we find some confusion. He says (Rec., 41) that he made the contract with Mr. Warfield and Mr. Kendall. This he repeats (Rec., 44), saying that he personally made the contract upon which complainant relies with Mr. Kendall and Mr. Warfield. Afterwards Kirchoff grows less certain (Rec., 49), saying that the contract was made with Mr. Warfield. He does not remember whether Kendall was even present, and subsequently Kirchoff settles down to the proposition (Rec., 51) that he made this contract with Mr. Warfield alone.

Kirchoff is equally uncertain as to *when* he made the contract. Sometimes he says that he made it in 1878 before the first foreclosure bill was filed. (Rec., 59) He also says (Rec., 44) that the contract was made in 1879.

There is some uncertainty between the witnesses as to whether the contract embraced redemption of one lot or of two lots. Kirchoff says throughout his testimony that it was the homestead that was to be redeemed. The homestead lot was a corner lot, fronting on Rush street. There was a smaller lot, not contiguous to the homestead lot, but barely touching it on one corner, fronting on Pine street, and the decree of the State Court has allowed redemption both of the homestead lot and of the Pine street

lot. The Rush street lot was the only lot occupied as a homestead. (Rec., 68.) It is Warfield's testimony that the agreement embraced the homestead and the lot cornering on the homestead. (Rec., 69.) Kendall, on the other hand, understood that the agreement covered only the Rush street lot, for Kendall drew up the deed which Kirchoff requested from the company, and sent that deed to the company for execution. The only property described in that deed was the one lot on Rush street. (Rec., 291.)

Kirchoff, in his testimony, says that the alleged agreement was made by him as agent for his wife. In his answer to the petition for a writ of assistance, however, he swears that the agreement was made for himself, and that it provided that the company would make to him, or to whomsoever he might nominate, a deed for the two lots.

Comment on such testimony as this is superfluous. We refer to it now merely because it emphasizes our proposition that the value of the Federal decree cannot be made to depend upon the weight which State Courts may or may not give to the evidence of discredited agents and interested witnesses testifying to the same matters passed upon by the decree.

The great gift of civilized government is the means for the peaceful determination of private disagreements. When a judgment or decree is once rendered by a court of competent jurisdiction, that judgment is binding upon the parties for all time to come. It stands by its own strength, and is not subject to impeachment in any other manner than along those narrow lines which public policy and the practice of the courts have established. The suitor, who

has secured a favorable judgment, is protected by it against any infirmities of memory which his witness may afterwards suffer, and against the obliquities of human nature, to which witnesses are more or less liable. A judgment resting upon memory or honesty, would have for its foundation the weeds that ride the sea. It might appear permanent enough to-day, but to-morrow would be drifted from the vision. Doubtless unjust judgments have been entered, both in State and Federal Courts, but to permit any court to disregard the judgment of another because it attached different weight to the evidence upon the question submitted, would be to make litigation endless; to deprive the Federal Courts of the paramount authority which they now exercise upon subjects of Federal law, and in our effort to escape the ills we know, to fly to others, and greater, that we know not of.

FRANK L. WEAN,

E. PARMALEE PRENTICE.

JOSIAH H. DRUMMOND,

Of Counsel.

No. 155.

JAMES H. MCKENNA

Brief of Herbert & Buell &

Filed Dec. 3rd 1897.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1907.

No. 155.

UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

ELIZABETH KIRCHOFF.

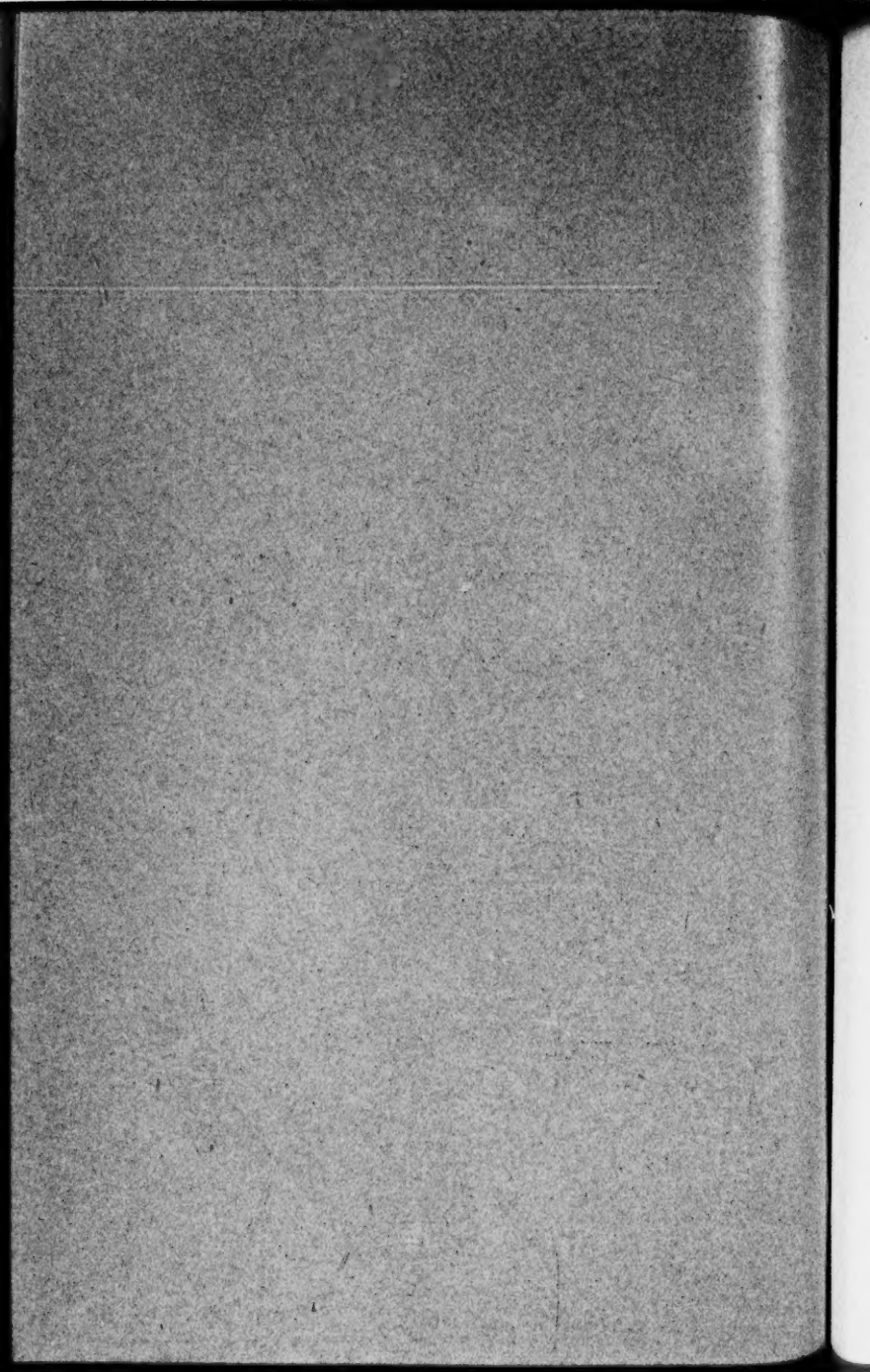
IN ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

W. S. HARBERT,

IRA W. BUELL,

SOLICITORS FOR DEFENDANTS IN ERROR.



IN THE
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PLAINTIFF IN ERROR,

v.

ELIZABETH KIRCHOFF.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN
ERROR.

The bill in this case was originally filed on June 12, 1882. In addition to all the proceedings which took place in the Circuit Court of Cook County, Illinois, the case has been twice to the Appellate Court of the First district of Illinois, and three times to the Supreme Court of the state and once before in this court. During this protracted litigation, covering a period of fifteen years, all the facts in the case have been sifted and re-sifted and argued and re-argued before the courts of Illinois to such an extent that a single copy of the briefs of counsel in this case

would compose a volume of several hundred pages. Having run its course in the courts of the State of Illinois, the case is brought for a second time to this court by a writ of error to the Supreme Court of the state, upon the alleged ground that a Federal question is involved and under the guise of that issue it is sought by counsel for plaintiffs in error to re-try the issues in this court.

This case was before this court at the October term, 1895, upon a former writ of error to the Supreme Court of the State of Illinois, to review a judgment rendered by that court on June 12, 1890, which writ upon a hearing was dismissed upon the ground that the judgment of the Supreme Court of the State of Illinois was not a final judgment.

Union Mutual Life Ins Co. v. Kirchoff,
160 U. S., 374.

The decision of the Supreme Court of the state above referred to, affirmed the judgment of the Appellate Court of the First district, which reversed and remanded the cause to the Circuit Court of Cook County, for the purpose of an accounting between the parties as prayed in the bill and thereupon entering a decree in favor of defendant in error; and this court held that until such accounting was had the decree was not final.

After the decision of the Supreme Court of Illinois, to which the former writ of error was prosecuted, the accounting was had in the Circuit Court of Cook County and another decree entered. The cause was then appealed by the Insurance Company to the Appellate Court of the First district, which affirmed the decree of the Circuit Court (51 Ill. App., 67), from which decision an appeal was prosecuted to the Supreme Court of the state, which

affirmed the judgment of the Appellate Court. (149 Ill., 536.) It is to reverse this last judgment of the state Supreme Court that this writ of error is prosecuted.

THE RECORD.

Presented in chronological order, the proceedings ran as follows :

Original bill filed June 12, 1882. Amended bill filed March 10, 1887. Bill dismissed July 12, 1887, and decree.

From this decree an appeal was prosecuted directly to the Supreme Court of the State of Illinois, but was there dismissed, on the ground that it should have been taken to the Appellate Court. (128 Ill., 199.)

Thereupon a writ of error was taken from the Appellate Court of Illinois to the trial court, and upon the hearing of that writ, January 26, 1893, the Appellate Court reversed the decree of the Circuit Court and the cause was remanded for further proceedings in conformity with the opinion of the Appellate Court. The order of reversal will be found in the record at page 301. The opinion of the Appellate Court filed in the court below is in the printed record at page 399. (33 Ill. App., 607.) This opinion, being brief, is here reproduced in full: "The facts in this case, as established by a preponderance of evidence, are that in May, 1871, the Insurance Company loaned \$60,000 to the complainant and plaintiff in error, and her husband, Julius Kirchoff, and her mother, Angela Diversey, upon their note, secured by a trust deed, conveying many parcels of land belonging to them in severalty, among which were lots 2 and 4, in block 21, of the Canal Trustees' Subdivision of the south

“ fractional quarter Sec. 3, T. 39 N., R. 14 E. 3d P. M.,
 “ which were the property of the complainant.

“ In 1878 there was default in payment. Reasons not
 “ very clearly shown by the record led to negotiations
 “ which resulted in the conveyance by the mother, of all
 “ her lands included in the deed, except forty acres which
 “ the company released to her, and by the complainant
 “ and her husband of all their lands included in the deed,
 “ which conveyances the company accepted in satisfaction
 “ of their debt; but as part of the transaction it was
 “ agreed that the complainant might purchase from the
 “ company those lots for \$10,000, the terms for the pay-
 “ ment of which are involved in considerable uncertainty,
 “ except that they were to extend over a period, proba-
 “ bly of nine years, but which certainly has now elapsed,
 “ and the rate of interest was to be six per cent.

“ She filed her bill to have the benefit of this agree-
 “ ment. The bill was dismissed upon the hearing. As
 “ was said in *Sargent v. Howe*, 22 Ill., 148, the deed of
 “ trust in this case ‘only differs from a mortgage with
 “ power of sale in its being executed to a third person in-
 “ stead of the creditor’; and, therefore, the dealings be-
 “ tween the parties are within the rule applicable to
 “ mortgagors and mortgagees: ‘that the courts look
 “ upon their transactions with jealousy.’ 1 Jones Mtg.,
 “ 711.

“ The evidence as to the agreement is by the testimony
 “ of Julius Kirchoff, E. A. Warfield, then general agent,
 “ and R. B. Kendall, then attorney of the company, and
 “ it was made between Julius Kirchoff, acting for the
 “ complainant, and Warfield, with some participation by
 “ Kendall, acting for the company.

“ The authority of Warfield to act for the company

“under circumstances as shown by this record has been
 “affirmed by the Supreme Court in the cases of this
 “*Company v. White*, 196 Ill., 69, and *v. Slee*, 110 Ill.,
 “35. The testimony of Julius Kirchoff is much weak-
 “ened by the inconsistency of his conduct afterwards
 “with the agreement, but it is so corroborated by War-
 “field and Kendall that there is sufficient proof of the
 “agreement.

“Before the conveyance to the company the company
 “had commenced foreclosure proceedings, in which they
 “sought to reform the description of part of the lands of
 “Mrs. Diversy. She had answered, contesting it and
 “alleging a defense, which, if successful, would have in-
 “validated most, if not all, of the papers she had exe-
 “cuted. The company understood, whether correctly or
 “not is immaterial, that they could make no adjustment
 “with her without the assent of the Kirchoffs. There
 “were, therefore, considerations to induce the company
 “to make the agreement, and that they did make it is
 “satisfactorily proved, and they have had from it all the
 “benefit they proposed to obtain by it. The foreclosure
 “proceedings went on after the conveyance, to cut off
 “the intervening title, but with the agreement that it
 “should not affect the agreement as to the lots described.

“The company obtained deeds under the foreclosure in
 “January, 1882, but refused to perform the agreement
 “made by Warfield. As to the effect of this agreement,
 “the rule in equity, ‘once a mortgage always a mort-
 “gage,’ applies.

“As was said in *Enner v. Thompson*, 46 Ill., 215,
 “‘When the mortgagor has conveyed the mortgaged
 “premises to the mortgagee, it only operates as a bar to
 “the equity of redemption, when it clearly and unquivo-

“cally appears that both parties so understood and intended it should.’

“Here the contrary as to the two lots clearly and unequivocally appears; and it does not affect the complainant’s right to redeem those lots that as to the residue of the mortgaged property there is no redemption, and that she proposed to pay but a small part of the original debt. When by the operation of law upon the acts or by the agreement of the parties the debt has been apportioned and a part of it made the sole burden upon a part of the incumbent property, that part may be redeemed by paying that part of the debt apportioned to the part redeemed. *Meecham v. Steele*, 93 Ill., 135; *Mutual Mills Ins. Co. v. Gordon*, 121 Ill., 366.

“The complainant filed her bill to redeem in June, 1882. The lots she was to redeem and the principal sum she was to pay, as well as the rate of interest are definitely fixed by the agreement.

“The term at which the interest was to begin and the amounts and times of payment of the installments are left uncertain; but this is not a bill for specific performance, *it is an appeal to a court of equity by the complainant that she may have her property restored to her upon the terms that she shall discharge the burden upon it, fixed in amount by agreement, and which, if that agreement had been executed and performed, would have been discharged in the time that has elapsed.*

“She is now entitled to the benefit of that agreement upon the terms that she, within a short time after the amount is ascertained, pay it.

“The decree is, therefore, reversed and the cause remanded to the Circuit Court with directions to that court to have an account taken of the amount due the

"company, crediting them with the principal sum of
 "\$10,000 and interest thereon at six per cent. from Sep-
 "tember 10, 1879, the day of the delivery of the deed
 "of the complainant and her husband, together with
 "whatever the company has paid for taxes, assessments,
 "insurance, repairs, and other expenses upon the prop-
 "erty, so far as the same may be found to have been
 "reasonably necessary, and charging them with the rents
 "and profits which they have or by ordinary care and
 "diligence ought to have received from the property, in-
 "terest to be allowed upon the disbursements if not repaid
 "by the rents and profits (but there is to be no com-
 "pounding of interest) and, when the amount due the
 "company is ascertained, to enter a decree that upon the
 "payment of that amount, with interest thereon, within
 "ninety days thereafter, the company convey to her, and
 "that in that event she recover her costs.

"But if she do not so pay, the bill will be dismissed at
 "her costs.

" *Bremer v. Canal and Dock Co.*, 127 Ill.,
 "464."

From this decision, the Insurance Company prayed an
 appeal to the Supreme Court of the state. (Pr. Rec.,
 303.)

The assignment of errors therein is as follows:

"1. The Appellate Court erred in that its findings and
 "judgment are contrary to the evidence.

"2. The Appellate Court erred in that its findings
 "and judgment are contrary to the law.

"3. The Appellate Court erred in reversing and re-
 "manding the decree of the Circuit Court of Cook
 "County.

"4. The Appellate Court erred in not affirming the decree of the Circuit Court of Cook County.

"5. The Appellate Court erred in holding that appellee was entitled to redeem.

"6. The Appellate Court erred in holding that appellee was entitled to redeem upon the payment of \$10,000 and interest thereon at six per cent, instead of eight per cent., as stipulated in the mortgage debt.

"7. The Appellate Court erred in holding that appellee was entitled to redeem on the payment of \$10,000 and interest, instead of \$17,000, the amount for which the lots were bid in at the sale.

"8. The Appellate Court erred in admitting as competent evidence, impeaching the recital of the quitclaim deed of appellee to the effect that it was given in satisfaction of the indebtedness.

"9. The Appellate Court erred in permitting Julius Kirchoff to testify in behalf of his wife, the appellee.

"10. The Appellate Court erred in reversing the decree of the Circuit Court and remanding with special instructions, instead of remanding generally."

"Wherefore appellant prays that said judgment of Appellate Court may be reversed."

(Signed by Counsel.)

(Pr. Rec., 303.)

(It will be seen that no Federal question was raised by the assignment of errors.)

The Supreme Court affirmed the judgment of the Appellate Court. The order of affirmance and opinion rendered at the same time appearing in the printed record at page 305 (133 Ill., 368). To this judgment of the Supreme Court of Illinois a writ of error was prosecuted from this court but upon a hearing was dismissed

on the ground that the judgment of the Supreme Court was a final judgment (160 U. S., 374).

In the meantime the order of the Appellate Court which directed an accounting, had been carried out and a decree entered settling the accounts between the parties and ordering the Insurance Company to convey the property in question upon the payment of the amount found due, to wit: \$18,858.54, or in default thereof that the master in chancery make the conveyance, had been entered. (Pr. Rec., 409.)

From this decree the Insurance Company appealed to the Appellate Court, which affirmed the decree of the Circuit Court, the order of affirmance appearing on page 511 and the accompanying opinion on page 514. (51 Ill. App., 67.)

This second judgment of the Appellate Court was also affirmed by the Supreme Court, the order and opinion appearing in the record at page 515. (149 Ill., 536.)

The money required to be paid by Mrs. Kirchoff was duly paid and the master thereupon executed to her a conveyance of the property. To this last judgment and order of the Supreme Court of the state, the Insurance Company prosecuted a writ of error, now here presented. As before stated, this cause was before this court at the October term, 1895, upon a former writ of error to the Supreme Court of the state, to review a judgment rendered in that court on June 12, 1890, which writ upon a hearing was dismissed upon the ground that the judgment of the Supreme Court of the State of Illinois was not a final judgment.

Union Mutual Life Ins. Co. v. Kirchoff,
160 U. S., 374.

Last September the following motion was made :

“Now comes Elizabeth Kirchoff, the defendant in error, by George R. Daley, her solicitor, and moves the court to dismiss the writ of error herein, for want of jurisdiction, and further moves that in case the court shall find it has jurisdiction of the case, then that it affirm the judgment of the Supreme Court of the State of Illinois, because it is manifest the said writ of error was taken for delay only, and that the question on which the jurisdiction of the court depends is so frivolous as to not need further argument.

“(Signed) GEORGE R. DALEY,
“*Solicitor for Defendant in Error.*”

The hearing of that motion was by order of this court postponed, to be taken up when the cause should be reached on the calendar. A very large portion of the argument of plaintiff in error consists in a discussion of the effect of the evidence, and if we do not join in the discussion *it is not from any hesitancy in discussing the facts involved in the case, but because we do not understand that these facts are in issue upon the hearing of this writ of error. All the facts necessary to a complete understanding of the case are set out in the opinion of the Supreme Court of the state. (Pr. Rec. 305.)* As we understand the practice, the inquiry of this court extends merely to ascertaining :

I. WHETHER A FEDERAL QUESTION IS INVOLVED.

II. IF SO, WHETHER THAT QUESTION WAS CORRECTLY DECIDED BY THE STATE COURT.

We shall, therefore, address ourselves to these questions in their order, without discussing the facts any further than may be necessary to an understanding of those questions and the scope of the findings of the state courts.

STATEMENT OF FACTS.

The facts are well stated in the report of the case upon the hearing of the former writ of error. We quote same from that report as follows (160 U. S., 374):

“ On May 8, 1871, Julius Kirchoff, being engaged in
 “ the distillery business in Chicago, borrowed \$60,000 of
 “ the Union Mutual Life Insurance Company, and to se-
 “ cure the payment thereof, executed together with his
 “ wife, Elizabeth, and her mother, Angela Diversey, a
 “ joint judgment note for \$60,000 and a trust deed cover-
 “ ing certain real estate in Chicago, belonging to Kirchoff
 “ and his wife, and certain other property, including a
 “ farm in Cook County, owned by Mrs. Diversey. The
 “ money received from the loan was put in the bank to
 “ the credit of the firm of Kirchoff Bros. & Co., which
 “ soon after failed.

“ In 1876, default having been made in the payment
 “ of interest and taxes, judgment was taken against
 “ Mrs. Diversey on the note after certain unsuccessful
 “ negotiations towards funding the indebtedness into a
 “ new loan at a lower rate of interest, and on July 11,
 “ 1878, proceedings were commenced in the Circuit
 “ Court of the United States to foreclose the trust deed.
 “ The bill in addition sought to cure a misdescription of
 “ the property belonging to Mrs. Diversey, who filed an
 “ answer denying the right of the company to cure the
 “ misdescription and averring that the notes and mort-
 “ gage were procured from her by misrepresentation.

“ From this time the relation of the parties seems to
 “ have remained unchanged until June, 1879, when an

“ agreement was reached by which the company released
 “ to Mrs. Diversey its claim upon forty acres of the land
 “ belonging to her, and she executed to it a warranty
 “ deed for the remainder of the premises. About the
 “ same time, Mrs. Kirchoff and her husband executed a
 “ quitclaim deed of all the property belonging to them
 “ and included in the mortgages. The deed from Mrs.
 “ Diversey was immediately placed on record, but the
 “ deed from the Kirchoffs was withheld by the agent and
 “ attorney of the Insurance Company.

“ It was claimed by Mrs. Kirchoff that during the
 “ negotiations which culminated in the execution of the
 “ above deeds, it was agreed that the Insurance Com-
 “ pany should re-convey to her two lots included in her
 “ deed, one of which was then occupied as a homestead,
 “ the other cornering upon it, but facing the other way ;
 “ that the price at which the re-conveyance should take
 “ place was their valuation at a previous appraisement
 “ made by one Rees, viz : \$7,500 and \$2,500, respectively,
 “ and that Mrs. Kirchoff was to execute in payment
 “ therefor her notes for \$10,000, extending over a period
 “ of ten years, bearing interest at six per cent., and se-
 “ cured by a mortgage upon the two lots. It seems
 “ there were certain intervening claims on one of the
 “ lots, growing out of a sheriff's deed, executed pur-
 “ suant to a sale on a judgment against Mrs. Kirchoff,
 “ rendered subsequently to the original trust deed, but
 “ prior to the deed from Kirchoff and wife to the com-
 “ pany, which rendered necessary a further prosecution
 “ of the foreclosure proceedings in order that the company
 “ might obtain a good title to the premises, so as to
 “ convey a clear title to Mrs. Kirchoff and take from
 “ her a mortgage which would be a first lien thereon. It

"is claimed that this matter was explained to Mrs.
 "Kirchoff, her husband and agent, and he was assured
 "that the prosecution of the foreclosure proceedings
 "would not in any manner affect the agreement which
 "had been made, but that, as soon as the company got a
 "deed from the master in chancery, it would carry out
 "its part of the contract by conveying to Mrs. Kirchoff
 "the premises in question, and would then take the mort-
 "gage from her. She alleged that, relying upon thi
 "agreement, no defense was made to the foreclosure pro-
 "ceedings by her, and the same were prosecuted to a de-
 "cree, and the master's deed issued thereon to the Insur-
 "ance Company January 21, 1882. The object of the
 "bill in this case was to insist upon this right of remp-
 "tion, in accordance with its terms.

"The Insurance Company, on the other hand, con-
 "tended that an inspection of the record showed that
 "no such agreement was ever concluded, and that the
 "state court was bound by the decree of the Federal
 "court foreclosing the mortgage, and had no jurisdic-
 "tion to review it. It was not disputed that proposi-
 "tions similar to the so-called agreement were dis-
 "cussed between the Kirchoffs and the agents of the
 "Insurance Company, or that assurances were given
 "by the latter of the probable willingness of the Insur-
 "ance Company to sell the land on the terms named;
 "but it is claimed that when the Insurance Company was
 "advised of the proposition, it was instantly and un-
 "equivocally declined, and this action of the company
 "communicated to Mrs. Kirchoff in time to prevent any
 "injury to her from the quitclaim deed. That, after hav-
 "ing been thus fully advised, she elected to deliver the
 "deed, and in that manner get the benefit of the release
 "from her indebtedness.

" A demurrer was filed to the bill, which was over-
 " ruled, when defendant answered, denying the agree-
 " ment for redemption set forth in the bill, and also set-
 " ting up the statute of frauds as a defense. The case
 " coming on for hearing upon pleadings and proofs, the
 " bill was dismissed for want of equity. An appeal was
 " taken to the state Supreme Court which was dismissed
 " upon the grounds that the case should have gone to the
 " Appellate Court. 128 Illinois, 199. Whereupon the
 " complainant sued out a writ of error from the Appel-
 " late Court of the First district of Illinois to the Cir-
 " cuit Court of Cook County, and upon a hearing in the
 " Appellate Court the decree of the Circuit Court was re-
 " versed, with directions to enter a decree in accordance
 " with the opinion of the Appellate Court. 33 Illinois
 " App., 607. This opinion was not sent up with the
 " record in this case. From the decree of the Appellate
 " Court the Insurance Company prosecuted an appeal to
 " Supreme Court of the state, which affirmed the decree
 " of the Appellate Court. 133 Illinois, 368."

The foregoing is a statement of the case as it appeared
 to this court upon the former hearing. There is also a
 full statement of the facts in the first opinion of the
 state Supreme Court. (Pr. Rec., 305; 133 Ill., 608.)

Justice WILKIN, delivering the opinion of the State
 Supreme Court at the last hearing of this cause, (149 Ill.,
 536) says (Pr. Rec., 516) :

" The controversy was whether a contract had been
 " entered into between the parties whereby the company
 " in consideration of the quitclaim deed by Mrs. Kirchoff
 " to it, and the payment of a certain sum of money; had
 " agreed to reconvey to her the lots in question, and
 " whether, if such an agreement was made, the com-

“ plainant was entitled, under all the facts of the case, to
 “ enforce it in this action. The terms of the contract and
 “ all the facts are there fully stated and the merits of the
 “ case settled adversely to the company.

“ On the remandment of the cause to the Circuit Court
 “ it was referred to a master to state the account, in con-
 “ formity with the directions given in the opinion of the
 “ Appellate Court.

“ On the coming in of his report the same was approved
 “ and a decree entered requiring the complainant to pay
 “ the defendant \$18,858.54 and interest within ninety
 “ days, and thereupon the defendant to convey to her the
 “ premises.”

This payment the complainant made in accordance with
 the decree and the master executed to her a deed, and she
 was put in possession of the premises.

From this decree, as before said, the company appealed
 to the Appellate Court, where a judgment of affirmance
 was entered, and it now prosecutes its second writ of er-
 ror thereto.

The court further says in the same opinion:

“ Much of the argument of counsel for appellant is de-
 “ voted to an effort to show a want of jurisdiction in the
 “ Circuit Court of Cook County over the subject-matter
 “ of this litigation.

“ Whether upon this second appeal that is an open
 “ question we do not deem it important to determine,
 “ being clearly of the opinion that the position of counsel
 “ is untenable. It is said the suit is brought to review
 “ and set aside a decree of the United States Circuit
 “ Court, and the bill is treated throughout the discussion
 “ as hostile to the foreclosure proceeding in that court,

“ or as attempting to obtain relief properly available in
 “ that action.

“ This is a misapprehension of the scope and purpose of
 “ complainant’s bill. In our former opinion we said:
 “ ‘ After the settlement had been concluded it turned out
 “ that certain encumbrances existed against some of the
 “ property which were subsequent to the trust deed, but
 “ which would take priority to the quitclaim deed exe-
 “ cuted by complainant and her husband. It, therefore,
 “ became necessary, in order to obtain a perfect title, to
 “ go on with the foreclosure proceedings, which was done.’
 “ This statement is based upon an allegation of the bill to
 “ the effect that it being represented to the complainant by
 “ the attorney of the company that it would be necessary
 “ to foreclose the trust deed in order to make good the
 “ title in the company to the lots before they could take
 “ a mortgage thereon for the installments of redemption
 “ money, it was agreed between the parties that the agree-
 “ ment for redemption should not be executed until after
 “ the title had been perfected in the company by foreclos-
 “ ure, but in the meantime complainants should execute
 “ and deliver to the company her quitclaim deed, and
 “ should interpose no defense to such foreclosure. The
 “ allegation was found in the opinion above referred to,
 “ sustained by proofs, *and is conclusive of that fact upon*
 “ *this appeal*. The foreclosure decree in this Federal court
 “ was, therefore, as much the result of the agreement re-
 “ lied upon by complainant as was the making of the quit-
 “ claim deed by her. So far from this being an attempt
 “ to review, modify or set aside the decree of the United
 “ States Circuit Court, the right of action is predicated in
 “ part at least upon it.

“ Whether the bill be called a bill to redeem, or given

“ another name, can in no way affect the question of jurisdiction in the state court. The relief sought is the enforcement of a contract to reconvey the property in question, which we have already held the complainant entitled to. Her rights grow out of the alleged contract, and not by reason of anything that was done or could have been done in the Federal court in the foreclosure suit.

“ That a court of equity has jurisdiction to enforce the contract whether it be called a contract to redeem or to reconvey is, we think too clear for argument. There is nothing in *Windett* *The Connecticut M. L. Ins. Co.*, 130 Ill., 621, or *Macney et al. v. Dewey et al.*, 127th Ill., 325, to the contrary.

“ On the accounting the company claimed credit for items of money expended in payment of taxes and the purchase of tax titles against the property prior to the agreement to reconvey, which on objection by complainant, were disallowed. This ruling is assigned for construction of the contract. This complainant was to pay the full appraised value of the lots, upon which the defendant was to reconvey to her. Certainly it was not intended that such payment should be made and the conveyance executed, and yet the company retain interest in or lien upon the property. The parties are presumed to have entered into the contract with a view to the then condition of the property and all existing liens and claims in favor of the company against it, and had they intended appellee to pay, in addition to the \$10,000, such claims, they certainly would have so stated in the agreement.

“ It appears that prior to September the 10th, 1884, the United States had seized the property for certain

“revenue taxes due from a firm then occupying it as a distillery, Mrs. Kirchoff, the owner of the property, being in no way connected with that firm.

“The property was sold, the government bidding it in and taking a deed for it. On the date named, by a commissioner of internal revenue, it conveyed to appellant, and it now attempts to set up that title against appellee in this suit. It paid the government \$500 for the title or interest it got by the commissioner’s deed, and in the account stated appellee was required to repay it that amount with interest. We think it clear, upon the authority of *Mansfield v. Excelsior Refining Co.*, 135 U. S., 326, cited in the argument of counsel for appellee, the United States took no title by its deed as against Mrs. Kirchoff. Therefore, by its conveyance to appellant, the latter at most took only the lien for delinquent taxes, and being fully indemnified for the money expended in obtaining such lien, complete justice has been done it.

“But if it were otherwise appellant cannot set up any right under its deed from the government, because those rights were acquired long prior to the rendering of the first decree in the Circuit Court, and consequently, to the submission of the case in this court upon the prior appeal.

“*Nothing is better settled than that ‘where a cause has been reviewed by this court and remanded with directions as to the decree to be entered, a party on a subsequent appeal cannot assign for error any cause that accrued or existed prior to the judgment of this court. All errors not assigned will be considered as waived and cannot afterwards be urged.’*” *Hook v. Richardson et al.*, 115 Ill., 431; *Village of Brooklyn v. Orthwein*, 140th

"*Ill., 620, and cases cited.* There is no error in this record, so far as we have been able to discover, and the judgment of the Appellate Court is therefore affirmed." (*Italics are ours.*)

"Affirmed." (Pr. Rec., 516.)

The complete record of the case is now before the court. During the prosecution of the foreclosure proceedings in the United States Circuit Court, a receiver was appointed of all the property, and about nine months after the confirmation of the report of sale the receiver filed a petition in said cause, stating that Julius Kirchoff was in possession of the premises in question and refused to pay rent therefor and asking for a writ of assistance to put him (the receiver) in possession. (Pr. Rec., 192.)

To a rule to show cause why such writ should not issue the husband of defendant in error filed an answer setting up the agreement in question as having been made with the company and asking that the writ do not issue lest *his rights* be prejudiced. The court nevertheless, issued the writ, and it is contended that this decision by the court, on this rule, operated as a *res adjudicata* of the issues involved in this case, and that the decree enforcing the claim of defendant in error does not give full faith and credit to this order of the United States Circuit Court.

The state courts found that the contentions of the complainant were established by a preponderance of the evidence and decreed in her favor as prayed. The Supreme Court of Illinois stated the agreement as found by it to be as follows:

"It was a part of the arrangement under which the complainant was to obtain the two lots in controversy

“that a decree of foreclosure should be entered, and that
 “the premises should be sold under such decree. The
 “decree was rendered and the sale made by consent for
 “the purpose of clearing the different tracts of land
 “mentioned in the quitclaim deed from certain encum-
 “brances.” * * *

“The substance of the agreement was that complain-
 “ant was to have the two lots in question, notwithstanding
 “ing her deed in September, 1879, and notwithstanding
 “the decree of foreclosure and sale thereunder, upon the
 “payment of \$1,000, and the execution of her notes se-
 “cured by a mortgage on the premises for the balance,
 “payable \$1,000 each year for nine years, with six per
 “cent. interest.” (Pr. Rec., 311.)

*We understand that where the facts are found by the
 state court, such finding will be considered conclusive.*

Egan v. Hart, 165 U. S., 188.

And that the opinions of the state courts will be con-
 sidered part of the record and looked to, to ascertain the
 questions presented and facts found.

Egan v. Hart, supra.

Still, notwithstanding this well recognized rule, the
 plaintiff in error makes a laborious attempt to show that the
 state courts were not warranted in their conclusions of fact.

If this court has jurisdiction to review the judgment of
 the Supreme Court of the State of Illinois, it is by virtue
 of section 709 of the Revised Statutes of the United States,
 which provides in substance that the final decree of a state
 Supreme Court may be re-examined by this court where
 any title, right, privilege or immunity is claimed under an
 authority exercised under the United States, and the de-

cision is against such title, right, privilege or immunity specially set up or claimed under such authority, that is by reason of a Federal question being involved. *In this case it must appear as a pre-requisite that the right claimed here was urged in the proper way at the proper time and then either :*

1. *That the state courts decided against the title of the company derived under the decree of foreclosure in the United States Circuit Court, the master's sale and deed thereon, or,*

2. *That the decision reviews a matter which was res adjudicata, by reason of the decision on the writ of assistance above referred to.*

BRIEF AND SUGGESTIONS.

FIRST.

THERE IS NO FEDERAL QUESTION INVOLVED AND THE
MOTION TO DISMISS SHOULD BE SUSTAINED.

Record and authorities cited below.

I.

THIS COURT HAS NO JURISDICTION FOR THE REASON THAT
IT DOES NOT APPEAR THAT THE RIGHT, TITLE, PRIVI-
LEGE OR IMMUNITY NOW CLAIMED WAS SPECIALLY SET
UP OR CLAIMED AT THE PROPER TIME AND IN THE
PROPER WAY.

Assignment of Errors, Pr. Rec., 303.

Willard v. Patill, 153 Ill., 663.

Kirchoff v. U. Mutual Life Ins. Co.

Pr. Rec., 305; 51 Ill. App., 67.

Hook v. Richardson et al., 115 Ill., 431.

Village of Brooklyn v. Orthwein, 140 Ill.,
620.

Ex Parte Spies, 123 U. S., 131.

Chappell v. Bradshaw, 128 U. S., 132.

*Susquehanna Boom Co. v. West B. Boom
Co.*, 110 U. S., 57.

Story's Eq Plead., Sec., 39.

1 Van Fleet's Former Adj., 492.

L., I. W. I. Co. v. Brooklyn, 166 U. S.,
685.

II.

THE TITLE ACQUIRED IN THE FORECLOSURE PROCEEDINGS
IN THE UNITED STATES CIRCUIT COURT IS NOT ATTACKED
BY THE BILL NOR DISCREDITED BY THE DECREE, AND,
THEREFORE, NO FEDERAL QUESTION IS PRESENTED.

a. The bill merely alleges the agreement and asks that it be enforced.

Pr. Rec., 13, 24, 25, 40, 66, 70, 87, 112,
317, 318, 409.

b. The perfecting of the title by the foreclosure proceeding was part of the agreement and the agreement was, therefore, not hostile to the foreclosure proceedings.

Pr. Rec., 318; 33 Ill. App., 612.

Pr. Rec., 112, 311.

149 Ill., 539; Pr. Rec., 516.

Mansfield v. E. Ref. Co., 135 U. S., 326.

c. The decrees in this suit does not disturb the foreclosure proceedings but merely directs a conveyance by the company pursuant to the agreement.

1st Opinion Ill. App. Ct., Pr. Rec., 399;
33 Ill App., 607.

1st Opinion Ill. Sup. Ct., Pr. Rec., 305;
133 Ill., 608.

Decree trial court, Pr. Rec., 409.

2nd Opinion Ill. App., Pr. Rec., 514; 51
App., 67.

2nd Opinion Ill. Sup. Ct., Pr. Rec., 517;
149 Ill., 536.

Opinion U. S. Supreme Ct., 160 U. S.,
374.

III.

THERE WAS NOT AND COULD NOT HAVE BEEN ANY ADJUDICATION IN THE FORECLOSURE SUIT OF THE ISSUES IN THIS SUIT.

(Argument post.)

a. *The application for writ of assistance placed in issue only the right of possession of the premises as between Julius Kirchoff and the receiver and the rights of the parties hereto were in no manner affected by the order issued on said application.*

Aspen v. Nixon, 4 How., 467.

b. *The defendant in error did not and could not while claiming under the agreement as she had a right to do, object to the foreclosure suit or to the decree therein or to the deed thereunder, as they were all contemplated by the agreement.*

c. *Till after the master's deed issued, Mrs. Kirchoff had no right to demand a conveyance from the company.*

IV.

THERE WAS NOTHING IMMORAL, INEQUITABLE, IMPROPER OR WHICH COULD HAVE RESULTED TO THE INJURY OF ANYONE IN THE AGREEMENT.

a. *The title was to go to Mrs. Kirchoff and her creditors, if any she had, would be benefited to the exact extent to which she would be benefited.*

b. *As a matter of fact, the purpose of the foreclosure proceeding was to cut off an adverse title intervening between the mortgage and the Kirchoff quitclaim, and for the*

purpose of doing this equity will prevent a merger of the two titles.

There were no unsatisfied judgments against Mrs. Kirchoff.

SECOND.

IF THIS COURT SHOULD HOLD THAT A FEDERAL QUESTION IS INVOLVED IN THIS CASE, THEN SUCH QUESTION WAS CORRECTLY DECIDED.

a. Proper effect was given to the decree of the Federal court.

Dupasseur v. Rochereau, 21 Wall., 130.
Crescent City Live Stock Co. v. Butchers' Union Slaughter House Co., 120 U. S., 141.

Smith v. Adsit, 23 Wallace, 368.

Wetherell v. Eberle, 123 Ill., 668.

Adams v. Burlington & Mo. R. R. Co., 112 U. S., 123.

Murdock v. City of Memphis, 20 Wall., 590.

Hale et al v. Akers, 132 U. S., 554.

Bacon v. Texas, 163 U. S., 207.

b. The agreement was predicated on a valuable consideration and the subject-matter was a proper subject for negotiations.

c. It is not necessary to give the proceeding a label. In chancery a right presupposes a remedy and the course pursued by defendant in error was the only course open to her.

Peugh v. Davis, 96 U. S., 332.

Villa v. Rodridge, 79 U. S., 323.

Argument post.

d. Though the question relates only to the character of the evidence and is, therefore, as we view it, a matter exclusively for the state courts, yet the agreement was not repugnant to the statute of frauds.

McManus v. O' Sullivan, 91 U. S., 578.

Romie et al. v. Casanova, 91 U. S., 379.

Warren v. Warren, 105 Ill., 568.

Beegle v. Wentz, 55 Pa. State R., 369.

Morrell v. Cooper, 65 Barb., 512.

Langtree v. Langtree, 51 Ill., 458.

Fishbeck v. Gross, 112 Ill., 208.

e. Issues of fact are not reviewable by this court.

Dowce v. Richards, 151 U. S., 658.

In re Nagle, 135 U. S., 141.

Kennedy v. Effinger, 155 U. S., 577.

Baldwin v. State of Kansas, 129 U. S., 52.

ARGUMENT.

FIRST.

THERE IS NO FEDERAL QUESTION INVOLVED AND THE MOTION TO DISMISS SHOULD BE SUSTAINED.

I. *This court has no jurisdiction for the reason that the right, title, privilege, or immunity now claimed was not especially set up or claimed at the proper time and in the proper manner.*

No new issues on the part of the complainant so far as the same effects the Federal question have been raised since the original bill was filed.

No evidence was taken and no issues tendered on the last hearing in the trial court except as to the accounting, concerning which, no question was raised and in which, therefore, this court is not concerned.

The decree of the Appellate Court on the first hearing fixed the rights of the parties as between the plaintiff and defendant, and sustained her contention with respect to the agreement and directed a decree requiring the defendant to convey to the complainant the premises in question.

From this decision the Insurance Company prayed an appeal to the Supreme Court of the state, but as heretofore shown, *the assignment of errors made no claim that the decree raised any Federal question, or denied any right, title, privilege or immunity secured by the Constitution or the laws of the United States.* (Pr. Rec., 303.) Any objection made thereafter came too late.

The question now relied upon was not raised until after the state Supreme Court had reviewed all errors that had been assigned. The fact that the alleged error was raised on the accounting, where it could not be made to apply except as to the deed from the commissioner of internal revenue, as to which plaintiff in error now raises no question, will not excuse the omission to urge the alleged error as to the decree fixing the rights of the parties.

On a writ of error no errors will be considered which were not assigned.

Willard v. Patill, 153 Ill., 663.

Where, upon a motion for a rehearing by the state court, after judgment, it is for the first time suggested that a Federal question is involved, a refusal to allow the motion is not enough to give the Federal court jurisdiction.

Susquehanna Boom Co. v. West Branch Boom Co., 110 U. S., 57.

Errors must be especially pointed out.

Cal. Furn. Co. v. Reinhold, 51 Ill. App., 323.

See, also, opinion in this case, 149 Ill., 536.

Hook v. Richardson et al., 115 Ill., 431.

Village of Brooklyn v. Orthwein, 140 Ill., 620, and cases cited.

The question of practice is not one of a Federal nature.

L. I. W. S. Co. v. Brooklyn, 166 U. S., 685.

When the ground of jurisdiction is the alleged denial of a title, right, privilege or immunity, secured by the Constitution or laws of the United States, it must appear that such title, right, privilege or immunity was specially set up, or claimed at the proper time and in the proper way *Miller v. Texas*, 14 S. Ct., 874; 153 U. S., 535; and *Morrison v. Watson*, 14 S. Ct., 995; 154 U. S. 111.

A party in order to avail himself of the privileges of Sec. 709, must present his claim to the state courts in apt time. And since this was not done in this case and no Federal question is *necessarily* involved in the decision by the Illinois court, the plaintiff in error is not in a position to now claim the benefit of said section. *Nowhere in the record does it appear that the plaintiff in error set up such claim until after the case had been reversed by the Appellate Court with directions to enter a decree in favor of complainant, and that decision of the Appellate Court had been affirmed by the Supreme Court of the state.*

In the second appeal to the Appellate Court the court say (Pr. Rec., 514): "On a former appeal this case is reported in 33 Ill. App., 607, and 133 Ill., 368—" "what was then decided can not now be reversed and the reasons then given for such decisions are, on this appeal, the law of the case.

"*Delwerth v. Curtis*, 139 Ill., 508, and cases there cited, are but a few among many. We shall, therefore, omit any reference to matters of defense by the appellant, which, if valid, existed before the first appeal. If we made a mistake in which the Supreme Court concurred, or if better arguments can now be made for the appellant than were then made, the result cannot be changed. The only question now open is upon the account as taken."

The Illinois Supreme Court, in this very case, have said (Pr. Rec., 518) : “ *Nothing is better settled than that where a cause has been reviewed by this court, and remanded with directions as to the decree to be entered, a party on a subsequent appeal cannot assign for error any cause that accrued or existed prior to the judgment of this court. All errors, not assigned, will be considered as waived, and cannot afterwards be urged.* ”

Also, see,

Hook v. Richardson et al., 115 Ill., 431.

Village of Brooklyn v. Orthwein, 140 Ill., 620, and cases cited.

Again, in *Rector v. Ashley*, 6 Wallace, 142, it was held that if the judgment of the state court can be sustained on other grounds than those which are of Federal cognizance, this court will not revise it, though a Federal question may have been decided therein and decided erroneously.

So, also,

Bacon v. Texas, 163 U. S., 207.

Murdock v. City of Memphis, 20 Wallace, 590.

In *Crowell v. Randall*, 10 Peters, 368, cited by plaintiff in error, the courts, discussing the Federal question, say : “ It is not sufficient to show that a question might have arisen and been applicable to the case, unless it is further shown on the record that it did arise and was applied by the state court to the case. ”

This court also held that : “ A right must be claimed or set up in the proper court below. As the Supreme Court of the state can review the decision of the trial

“court, it must be made to appear that the claim was made in the trial court, because the State Supreme Court is only authorized to review the judgment of that court for errors committed there. The United States Supreme Court can do no more.” *Ex parte Spies*, 123 U. S., 131.

II.

The title acquired in the foreclosure proceedings in the United States Circuit Court is not attacked by the bill nor discredited by the decree, and therefore no Federal question was presented.

a. The bill merely alleges the agreement and asks that it be enforced.

The bill of complaint of defendant in error alleges that after the delivery of her deed, said foreclosure proceeding was prosecuted by consent for the purpose of clearing the title to the premises, and that there was an agreement that when the company should receive its deed from the master it would convey the premises to her. This the defendant (here plaintiff in error) in its answer, denied. The validity of the title derived under the foreclosure proceedings was not called in question. The bill admitted that such a title existed, and the whole controversy rested entirely upon whether there was an agreement for a conveyance by the company to the complainant, which she could enforce in a court of equity. The prayer of her bill is not that the decree in the foreclosure proceeding and the conveyance by the master pursuant thereto be set aside, but that the company be compelled to convey to her. (Pr. Rec., 25.)

Upon reference to the opinion of the Appellate Court (Pr. Rec., 317) it will appear that the court in entering its decree did not attempt to set aside the title acquired by the company under and by virtue of the foreclosure proceeding, but expressly directed the Circuit Court to take an account and "when the amount due the company is ascertained to enter a decree that upon the payment of that amount with interest, thereon within ninety days thereafter, the company convey to her." (Pr. Rec., 318.) The decree of the Circuit Court conforms strictly to this order. (Pr. Rec., 409.)

b. The perfecting of the title by the foreclosure proceeding was part of the agreement. Such are the allegations in the bill (Pr. Rec., 13), and in the amended bill (Pr. Rec., 24) Kendall told Kerchoff the foreclosure would not affect the contract (Pr. Rec., 40-66, 112.) Warfield admits same thing. (Pr. Rec. 70, 87.)

The perfecting of the title by the foreclosure proceeding was part of the agreement and the agreement was therefore not hostile to the foreclosure proceedings.

The Appellate Court found that "the foreclosure proceedings went on after the conveyance to cut off an intervening title but with the agreement that it should not affect the agreement as to the lots described." (Pr. Rec., 318; 33 Ill. App., 612.) The legal title had already been conveyed to plaintiff in error and the object of the foreclosure was to remove a cloud and not a claim or judgment. (Pr. Rec., 112.)

"In passing on the contention raised by matters embraced in the bill the Illinois Supreme Court said (Pr. Rec., 311): 'It is also denied (claimed) that complainant's failure to assert the alleged agreement in the

Where the construction of a certain agreement involves no Federal question and is decisive of the entire case, the Supreme Court of the United States will not entertain jurisdiction of a writ of error to the judgment of the state court on the ground that there was also a Federal question raised and decided adversely to plaintiffs in error.

Hale et al. v. Akers et al., 132 U. S., 554:

In this case the court found that the City of Sonoma had established its claim to the land in controversy, within the meaning of a certain contract between Schell and Akers; that by the term of said contract each agreed with the other to abide by the decision of the United States on said claim of the City of Sonoma for said lands, as then pending before the United States Courts, and to abide by the boundary line between them as established, and the final confirmation of Pueblo lands to the City of Sonoma.

The court held that the written contract was intended to be and was decisive of their rights when it was executed; that the parties compromised the pending suit by dividing the 111 acres about equally between them, Akers releasing to Schell the eastern half and retaining the western half; that under the terms of the agreement, the only establishment of the Sonoma claim which the parties contemplated was such as would result from the action of the courts upon it and the issuing of a patent by the government, in pursuance of their decrees; that the parties evidently thought that if the city should finally succeed in establishing its claim and receive a patent for any of the land within the lines of the Huichica patent it would have the better title to the land and that they could,

therefore, avoid litigation and expense, and safely await the issue of the city's contest, and it was agreed that in case the city established its claim to any of the land he would pay Akers \$5 per year for the use of it, etc. This court says: "The Supreme Court decided that no Federal question was involved. Both of the courts below decided that, irrespective of the Federal question, the agreement of October 11, 1860, was decisive of the case. The construction of that agreement involved no Federal question and controlled the whole case."

In *Adams v. Burlington & M. R. R. Co.*, 112 U. S., 123, a question of estoppel was urged against a county where the original title to the land was derived by the county through grant by Congress, is not a Federal question. The court say: "There was nothing in the swamp land grant to prevent the county from surrendering the land to the railroad company if that was thought best. Under this defense the validity of the original title was not disputed. The claim was, that in legal effect that title had been ceded to the railroad company and that the county was in no condition to demand it back. There was no dispute about the Federal right itself, but about the consequence of what had been done by the parties in respect to it."

III.

THERE WAS NOT AND COULD NOT HAVE BEEN ANY ADJUDICATION IN THE FORECLOSURE SUIT OF THE ISSUES IN THIS CASE.

a. *The application for writ of assistance placed in issue only the right of possession of the premises as between*

Julius Kirchoff and the receiver. The rights of the parties hereto were in no manner affected by the order issued on said application.

It is contended that the decision of the Federal court upon the application for writ of assistance against the husband of defendant in error is a bar to the present action. It will be remembered that that application was made by the receiver appointed by the court to collect the rents. *It was made fourteen months after the entry of the decree in that cause and over a year after the sale by the master.* The report of sale had been filed just one year prior to the application and had been confirmed nine months prior thereto. *An entire term of court had intervened between the entry of the decree, the sale by the master and the report of the sale, and the application of the receiver. The master's report of sale was confirmed and the term of court at which that confirmation was made had expired.* Under those circumstances we fail to see how the court could have set aside the decree or settled any of the rights of the parties upon the application. It had lost all jurisdiction of the case. It is true it might have refused the writ of assistance but the *refusing or granting of this writ could in no manner be an adjudication of the controversy between the parties to this suit.*

The answer to Kirchoff was not filed with any intention of adjudicating in that case the rights of the parties, because unquestionably the court had no jurisdiction at that stage of the proceedings and in that form to pass on those rights. The answer was merely filed and the court asked not to issue the writ for fear that the rights of respondent would be prejudiced by its issuance. That it was not intended to litigate the facts in the case is evident from the answer itself which says that "said Kirchoff

“ further states that his solicitors have in course of preparation a bill in chancery setting up the foregoing facts and asking that complainant be required to execute its undertakings in the premises. (Pr. Rec., 107.) It is quite probable that counsel at that time were inclined to the opinion that the proper draft of a bill would be asking the alternative relief as stated in the answer of Kirchoff to the petition; but it is evident that they subsequently concluded that the *proper course was to wait until the company received its deed, as the defendant in error had agreed to do, and then ask that it be compelled to carry out its agreement.*

The entire scope of the application for writ of assistance was to determine whether Julius Kirchoff or the receiver was entitled to the possession of the premises. On that application the court might very properly say that the defendant in error could get no relief in that case and that the court would not undertake to determine who was in the right, but would by its receiver take possession of the premises itself, leaving her to her proper remedy by the bill which she was about to file, and in the meantime, the court having possession of the premises neither party could be injured.

But it is sufficient to say that *neither of the parties to this case was a party to the application for the writ of assistance*; and the decision on that writ was against Julius Kirchoff only and not against defendant in error. (Pr. Rec., 192.) The defendant in error certainly cannot be bound by a proceeding to which she was not a party.

“ A judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, ^{to} be conclusive must have been made: 1, by a court of competent juris-

“ diction upon the same subject-matter ; 2, between the same parties ; 3, for the same purpose.”

Aspden v. Nixon, 4 How., 467.

If the above rule be applied to the foreclosure proceedings, it will be seen that though they were between the same parties and upon the same subject-matter as the present suit, yet they were *prosecuted for an entirely different purpose*, namely, to cut off an intervening title ; if applied to the application of the receiver for writ of assistance, it will appear that not only did the court have no jurisdiction in that proceeding, at that time, to determine the matters here involved, but *neither the parties nor the purpose was the same.*

We, therefore, contend that the application for a writ of assistance placed in issue only the right of possession of the premises as between Julius Kirchoff and the receiver, and that the rights of the parties hereto were in no manner affected by the order issued on said application ; that the rights of the parties to this suit could not have been determined in the foreclosure case, for the reason, among others, that the court had lost jurisdiction over the said cause ; that the application for the writ put in issue only the possession, and not the title ; that neither of the parties to this cause was a party to that proceeding, and that the order entered on that application is not a bar, for the reason that the purpose of the proceeding was not to settle the title, and the court did not have jurisdiction of either the parties to or the subject-matter of this cause.

b. The defendant in error did not and could not while claiming under the agreement, as she had a right to do, object to the foreclosure suit, or to the decree therein, or to the deed thereunder, as they were all contemplated by the agreement.

Counsel urge several reasons why the decree in the foreclosure proceedings is conclusive, but they are all based upon the assumption that the company repudiated the agreement in November, 1879, and that Mrs. Kirchoff was apprised of that repudiation in time to have interposed her defense in the foreclosure suit. A full discussion of this point would involve an examination of the evidence, which we apprehend this court will not make. It would be sufficient answer to say that the Supreme Court of the State of Illinois held that the agreement was made, that Warfield, the agent of the company, had authority to make it (Pr. Rec., 305), and that the foreclosure proceedings were carried to decree pursuant to the agreement. As these findings necessarily involve the question assumed by counsel, this court, if necessary to support the decree of the state court, will consider those questions of fact determined against counsel's contention.

But, if the court will examine into the evidence and the circumstances surrounding the parties at that time, it will see how absurd is the contention made by plaintiff in error. Kendall, the attorney for the company, had advised the officers of the company that neither Kirchoff nor his wife were personally liable on the note secured by the trust deed. He was also aware that if a settlement of the case was made, it must be made with all parties. The correspondence shows that he was fully alive to all the interests of the company.

There is an intimation in Kendall's testimony that he tendered back to Kirchoff the quitclaim deed which appellee had executed to the company, or that he told him that he might withdraw it, but that Kirchoff declined to take it, insisting upon the company carrying out its con-

tract. He had previously testified that he did not tender it back. (Pr. Rec., 438.) The contradiction in Kendall's testimony arises from the fact that the letter-press copy of the letter from him to the company, dated November 8, 1879, was incorrectly transcribed by the master, and made to read: "I *have* communicated the "company's decision to Kirchoff" (Pr. Rec., 152); whereas the letter itself reads: "I *will* communicate the company's decision to Kirchoff." (Pr. Rec., 223; Exhibit 40.)

On a subsequent examination of the witness, he, having read over his previous testimony which contained the incorrect transcript of the letter, was of the opinion that he did communicate the company's decision to Kirchoff, and thought that he tendered the deed back to him. The letter itself shows that at the time it was written he had not told Kirchoff of the company's decision, and the deed was recorded at 1 o'clock (record says 10 by mistake) of the same day on which the letter was written. (Pr. Rec., 132.) So that, if he saw Kirchoff and tendered the deed back, he must have done so within a few hours after writing the letter to the company, a condition which renders such tender so improbable that it will require stronger evidence than the mere supposition of Kendall to lend it any weight. There is no evidence that he set aside or offered to set aside the default which he had taken against defendant in error in the foreclosure proceedings, but on the contrary, proceeded to take a decree against her.

If Kendall ever did tell Kirchoff that he might withdraw the deed, he never made the offer in good faith, with the intention of allowing it to be done; because he, as the company's attorney, knew that it was in no position to

surrender the deed. The note was a joint one (Pr. Rec., 191), and Mrs. Diversey, one of the joint makers, having been released from liability thereon some months prior, her co-obligors were likewise released.

1 Parsons on Contracts, 27.

Parmalee v. Lawrence, 44 Ill., 405.

Brooks v. Stuart, 9 A. & E., 854.

Both Mrs. Diversey and Mrs. Kirchoff had pledged their property to secure Kirchoff's debts, and as a portion of Mrs. Diversey property had been released from the trust deed and she released on the note the very thing which Kendall was careful to avoid would have occurred, and the lien of the trust deed upon Mrs. Kirchoff's property been endangered if not defeated.

At this time no hearing had been had in the foreclosure proceedings, and, in view of the fact that defendant's default had been obtained in pursuance of the agreement, and because of her reliance thereon, upon presenting the facts to the court, she would have had little difficulty in having the default set aside and obtaining leave to interpose a defense. That her defense based on the release of Mrs. Diversey, would have been successful will admit of no doubt.

That Kendall knew that it was impracticable to settle with one of the makers of the note without settling with all, is shown by his letter of January 1, 1879, in which he says that he dare not settle with Kirchoff without settling the whole matter, as it might prejudice the company's rights against Mrs. Diversy. (Pr. Rec., 216.) He must have known that the converse of this was also true; and that he could not settle with Mrs. Diversey without settling with the Kirchoffs. From this it is clear that Kendal

" foreclosure proceedings is a bar to its assertion here,
 " that the proceedings in the foreclosure are conclusive.
 " We are unable to concur in this position. It was part
 " of the arrangement under which the complainant was to
 " obtain the two lots in controversy, that a decree of
 " foreclosure should be entered, and that the premises
 " should be sold under such decree. The decree was
 " rendered and the sale made by consent for the purpose
 " of clearing different tracts of land mentioned in the
 " quitclaim deed, from certain encumbrances. The de-
 " cree was not adverse to the interest of complainant,
 " but in harmony with her interest. She is not attack-
 " ing the decree, but claiming the enforcement of an
 " agreement under which it was rendered; and in our
 " judgment there is no ground for holding that the rights
 " of complaint were cut off or in any manner impaired
 " by the decree."

Upon the last hearing before the Illinois Supreme
 Court on the appeal from the decree entered upon the ac-
 counting, the Supreme Court presented its views as fol-
 lows:

" It is said the suit is brought to review and set aside
 " a decree of the United States Circuit Court and the bill
 " is treated throughout the discussion as hostile to the
 " foreclosure proceeding in that court, or as attempting
 " to obtain relief properly available in that action. This
 " is a misapprehension of the scope and purpose of the
 " complainant's bill. In our former opinion we said:
 " 'After the settlement had been concluded it turned out that
 " certain encumbrances existed against some of the prop-
 " erty which were subsequent to the trust deed, but which
 " would take priority to the quitclaim deed executed by
 " complainant and her husband; it, therefore, became nec-

" essary, in order to obtain a perfect title, to go on with
 " the foreclosure proceedings, which was done.' This
 " statement is based upon an allegation of the bill to the
 " effect that it being represented to the complainant by
 " the attorney of the company that it would be necessary
 " to foreclose the trust deed in order to make good the
 " title in the company to the lots before they could take
 " a mortgage thereon for the installments of redemption
 " money it was agreed between the parties that the agree-
 " ment for redemption should not be executed until after
 " the title had been perfected in the company by foreclos-
 " ure, but in the meantime the plaintiff should execute
 " and deliver to the company her quitclaim deed, and
 " should interpose no defense to such foreclosure. The
 " allegation was found, in the opinion above referred to,
 " sustained by proofs, and is conclusive of that fact upon
 " this appeal.

" The foreclosure decree in the Federal court was,
 " therefore, as much the result of the agreement relied
 " upon by complainant as was the making of the quitclaim
 " deed by her. So far from this being an attempt to re-
 " view, modify or set aside the decree of the United States
 " Circuit Court, the right of action is predicated, in part
 " at least, upon it; whether the bill be called a bill to re-
 " deem or given another name, can in no way affect the
 " question of jurisdiction in the state court. The relief
 " sought is the enforcement of a *contract* to reconvey the
 " property in question, which we have already held
 " the complainant entitled to." (149 Ill., 539; Pr. Rec.,
 516.)

It was urged in the trial court, and also in the state
 Appellate and Supreme Courts, that the matters involved
 in this case were *res adjudicata* because of the foreclosure

proceedings in the United States Court, and the sale and deed thereupon.

Upon that question Judge TULEY, on the first hearing in the court below, said: "Assuming that in 1878 the agents of the defendant made a parol agreement with the complainant as to the sale back to her of the homestead. I find no estoppel by reason of the foreclosure proceedings. Although they may have been commenced adversely, the evidence of Warfield and Kendall show that they were not prosecuted adversely after the making of the agreement, and there is nothing inconsistent in the company deriving title under the foreclosure and agreement to convey the homestead to complainant after it had perfected its title by the foreclosure proceedings. Having received complainant's deed of her equity of redemption in the mortgaged premises in satisfaction of the mortgage debt to foreclose as against her."

It will be seen from the above quotations that the effect of the proceedings in the United States Court was carefully considered upon the former hearings of this case in the state courts, and the decision arrived at was that those proceedings furnished no defense, for the reason that they were had with the express agreement that as to the appellee they should have no force or effect, except in so far as they might be for her benefit in removing certain liens upon the title to said premises. Those proceedings were prosecuted equally for the benefit of both parties.

c. The decree in this case does not disturb the foreclosure proceedings, but merely directs a conveyance by the company pursuant to this agreement.

As before stated it will be seen by reference to the bill in

this case that no attack was made upon the decree of the United States Court, nor was that decree or the deed pursuant thereto set up as a bar to the relief prayed. *Referring to the assignment of errors upon the appeal from the Appellate Court to the Supreme Court of Illinois, which decree settled the rights of the parties, we find no claim that due credit and effect had not been given to the proceeding in the United States Court.* (Pr. Rec., 303.) The questions at issue were purely and simply whether or not *as a matter of fact* such an agreement as was alleged in the bill was made, and if so, whether or not, *as a matter of law*, the defendant in error was entitled to a conveyance from plaintiff in error; and we fail to see that the plaintiff in error is in any better position, by reason of deriving its title in part under a decree of the United States Court, than it would have been if that title had been derived by virtue of a patent from the government, or in any other manner. We see no reason why the fact that the title which it holds was derived in part by virtue of an authority exercised under the United States should in any manner absolve the plaintiff in error from the performance of its agreement, or that the enforcement of that agreement in any manner discredits the source of its title.

As a matter of fact the master's deed did not transfer the record title from Mrs. Kirchoff to the plaintiff in error. That had already been done by her quitclaim deed, which was originally all that had been contemplated as sufficient to put the legal title in the company so as to enable it to give a deed to Mrs. Kirchoff, who in turn was to give back a mortgage which would be a first lien on the homestead.

We had always supposed that a title acquired by such a decree might be disposed of the same as if acquired in any other manner; that it might be leased, mortgaged, sold, conveyed or devised, the same as a title acquired by an ordinary deed, and a pre-existing agreement would apply to it in the same manner.

Here it is admitted that the company has the title. It acquired that title in part under the quitclaim deed of Mrs. Kirchoff and in part through the foreclosure proceedings in the United States Court; but in whole pursuant to the agreement that when it should be acquired it would be conveyed to the defendant in error. A bill to enforce that agreement is not one attacking that title.

In *Roby v. Colehour*, 146 U. S., 161, Roby while holding the title to certain property in which the Colehours were interested, went into bankruptcy and afterward purchased the property at a sale by his assignee. Some years later the Colehours brought suit against Roby to enforce the recognition of their interests in the property and to set aside a deed from William H. Colehour to Roby. Roby set up his own bankruptcy proceedings and claimed title from his assignee in bankruptcy. The case was decided against him and he appealed to the Supreme Court of Illinois, which affirmed the decree of the lower court; upon which he prosecuted a writ of error from the Supreme Court of the United States to the state court, upon the ground that a title or right was claimed under an authority exercised under the United States by virtue of the bankruptcy proceedings. A motion was filed to dismiss the writ of error which this court denied but stated that the question was a close one.

The distinction between that case and this is that in that case there was no agreement as to Roby's purchase from his assignee in bankruptcy. If there had been an agreement that when he should have received title from the assignee he would convey to the Colehours and they had filed a bill to enforce that agreement, and the state court should have directed him to convey accordingly, then the case would have been like the one at bar. There it was claimed that he held the title to a part of the premises in trust and that as to that part nothing passed to the assignee in bankruptcy and that consequently the deed from the assignee conveyed no title to that part. Here nothing of the kind is claimed, but on the contrary it is admitted that the foreclosure proceeding and master's deed did clear the property of an intervening title and must be taken in connection with the deed from defendant in error to vest a good title to the premises in the company, and that title when so vested is not attacked, but it is claimed that the company holds it in trust for the defendant in error by virtue of the agreement which is sought to be enforced.

In *Carpenter v. Williams*, Justice MILLER, in delivering judgment said: "It is a mistake to suppose that every suit for real estate in which the parties claiming under the Federal government are at issue as to which of them is entitled to the benefit of that title necessarily raises a question of Federal cognizance. If this were so the title to all the vast domain once vested in the United States could be brought from the state courts to this tribunal." 9 Wall., 785.

In *Wetherell v. Eberle*, 123 Ill., 668, the plaintiff sought to remove a cloud from her title growing out of a deed by the United States marshal, wherein objection is

urged on the alleged ground that the state court had no jurisdiction in regard to the matters relating to acts of a United States Court and its officers. It is urged that the decree disclosed unwarranted interference with legal proceedings in the Federal court.

The court say: "Not only the United States, but all its officers have ceased to have any power, control or jurisdiction over the case, the time for redemption expired and the marshal's deed has been delivered. The present suit does not attempt to review, revise or interfere with the judgment or processes of the United States Court, or does it question the validity or even the regularity of the sale under the execution. The question as to the validity of the title was not before the United States Court, and there was clearly no objection to the appeal on this ground."

In *Murdoch v. The City of Memphis*, 20 Wall., 590, the title to certain property had been vested by a deed from the City of Memphis, the defendant in error, and by the ancestors of Murdoch, the plaintiff in error, in one Wheatley, in fee in trust for the grantors and their heirs. "In case the same shall not be appropriated by the United States for that purpose" (for the purpose of a naval depot). On the 14th of September, 1844, the City of Memphis in consideration of the sum of \$20,000 paid by the United States conveyed the said land to the Government on covenant of general warranty, there being, however, in this deed to the United States no designation of any purpose to which the land was to be applied, nor any conditions precedent.

The United States took possession of the land for the purpose of the erection of a naval depot upon it, erected buildings and made various expenditures and improve-

ments for the said purpose but in about ten years after, by an act of August 1854, transferred the land back to the city *for the use and benefit of said city*. The bill charged that by the failure of the United States to appropriate the land for a naval depot, and the final abandonment by the United States of any intention so to do, the land came within the clause of the deed, conveying it to Wheatley in trust, but if not it was not held by the city in trust for the original grantors and the prayer sought to subject it to said trusts.

The court in deciding the case say: "The claim of right here set up is only to be determined by the different principles of equity jurisprudence and is unaffected by anything found in the Constitution, laws or treaties of the United States, whether decided well or otherwise by the state court we have no authority to inquire. According to the principles we have laid down as applicable to this class of cases, the judgment of the Supreme Court of Tennessee must be confirmed."

"This court has no jurisdiction to re-examine the judgment of a state court where a Federal question was not in fact passed upon, and where the decision of it was rendered unnecessary in the view which the court below took of the case."

McManus v. O'Sullivan, 91 U. S., 578.

Where in a state court both parties to a suit for the recovery of lands claimed under a common grantor whose title under the United States was admitted, and where the controversy extended only to the rights which they had severally acquired under it. Held, that as no Federal question arose this court has no jurisdiction.

Romie et al. v. Casanova, 91 U. S., 379.

never had any intention of returning Mrs. Kirchoff's deed to her. The company, after it took her deed, never was in a position where it could place her *in statu quo*, without a sacrifice on its part of many times the value of this property.

In regard to this alleged tender back Kirchoff says (Pr. Rec., 39) that they never gave the quitclaim deed back to him. Warfield says (Pr. Rec., 87) that the deed from Mr. and Mrs. Kirchoff was never tendered back to them to his knowledge. Kendall, before he had been misled by the incorrect transcript of his letter to the company, adverted to heretofore, says that the company never tendered back to Kirchoff a reconveyance of the property, and never tendered back his quitclaim deed. (Pr. Rec., 438.) Kirchoff where he says that "there was some talk," refers to no particular time, and that conversation may have occurred a year or more after the deed was recorded. He further says that he never saw the deed again.

Kendall says that upon receipt of the president's letter he thinks he tendered the deed back to Kirchoff, or gave him a chance to withdraw it. Let us see what the situation of the parties was at that time. The foreclosure sale did not take place for nearly a year after the date of that letter, and without defendant's deed the company had no title to the premises, but was at most only the beneficiary in the trust deed. Yet DeWitt writes as though the company owned the property. He says that they refused to *sell* upon the terms mentioned but will *sell* upon certain other terms. (Pr. Rec., 273.) What did they have to sell except the title acquired under the Kirchoff quitclaim? Clearly DeWitt supposed that the deed had been delivered absolutely and recorded at that time. In reply

to his letter Kendall before communicating with Kirchoff writes: "I don't think he will purchase but perhaps he will." (Pr. Rec., 222.) What could Kirchoff purchase at that time unless it was the title which the company acquired under the quitclaim? It, therefore, conclusively appears that at that time Kendall had no intention of returning defendant in error's deed. The deed was recorded the same day and it is more than likely that it was done at the time the letter was sent.

But supposing Kendall *did* offer to let Kirchoff withdraw the deed, and Kirchoff acting for his wife, "concluded to deliver it, insisting that he had a contract," and under those conditions the company accepted and recorded the quitclaim deed, and claimed title under it, by its acceptance under these circumstances would it not be estopped from denying the right of the defendant in error to a performance of the agreement which was a condition attached to its delivery?

It was after this that the defect in the title was discovered and the agreement made that the foreclosure proceedings should go on until that defect was remedied and that the company would then convey. (Pr. Rec., 111, 112.) What basis then is there for the claim that the agreement should have been set up in the foreclosure suit or that the decree in that suit is conclusive? If defendant in error had set up a defense in that suit it would have been in direct violation of her agreement with the company. Neither could she redeem from that suit, because if she had done so, such redemption would have been as to one of the lots for the benefit of an outstanding title. And further, the company had bid in the property at the foreclosure sale at a sum largely in excess of its value to prevent redemption by the intervening claim-

ant. (Pr. Rec., 193.) It is said that if the defendant in error had set up the agreement in that suit, the court would have recognized it and preserved her rights in the decree. The decree was entered just as it was agreed it should be. The court, if it had undertaken to carry out the rights of the parties under the agreement, could have entered no different decree.

Counsel urge *that the alleged repudiation by the company of the contract constituted a breach thereof, and that the plaintiff in error might have at once brought suit for the breach and consequently should at once have interposed a defense in the foreclosure proceedings.* If we should assume (what is not proven) that the company had repudiated the contract in 1879 and notified the plaintiff in error that it would not carry it out, she might have claimed a breach and brought suit, but she was not obliged to do so. *The time had not arrived for performance by the company. They were not to convey until they received a deed under the foreclosure proceedings. The rule is: "The promisee is not bound to treat the renunciation as a breach. He may, if he pleases, treat it as inoperative; but in that case he keeps the contract alive for the benefit of the other party as well as his own. If the promisor withdraw the notice of his intention not to perform before the promisee has elected to treat it as a breach, the latter loses his right to treat the contract as broken and the parties are in the same position that they would have been in if the notice had never been given."*

3 Amer. & Eng. Enc. of Law, 906.

Here by recording the quitclaim deed after the alleged notice that it would not perform, the company withdrew such notice and thereafter the defendant in error not only *need not but could not* claim a breach.

c. Till after the master's deed issued Mrs. Kirchoff had no right to demand a conveyance from the company.

Let us suppose that counsel for plaintiff in error had represented Mrs. Kirchoff; how would they have applied their homeopathic remedy and obtained in the United States Court the relief which the state court has adjudged to be due the complainant. Would they, as is to be inferred from their argument, have interposed a defense in the foreclosure case, after their client had been, as they claim, informed that the company would not carry out its agreement? If so, what defense would they have interposed and what would that court have said to them?

Let us imagine the conversation between counsel and the court upon their application to vacate the decree.

"Court: Has not your client conveyed to the company all her title to the premises?

Counsel: Yes.

Court: Was not that deed given, her default taken and this decree entered by agreement?

Counsel: Yes.

Court: And were not the premises to be sold and deeded to the company, pursuant to that agreement?

Counsel: Yes. Everything was done pursuant to the agreement.

Court: And you desire to insist upon your agreement?

Counsel: Yes.

Court: What right then has your client to complain?

Counsel: But the company has not carried out its agreement.

Court: The time has not yet arrived for it to do so.

Counsel: But it says that it will not do so when the time does arrive."

"Court: That is a matter which we cannot determine in advance. You have a valid agreement with the company, and if it fails to perform, you have the same right as any other litigant to go into court and compel the company to convey as agreed."

Having failed to obtain relief in the foreclosure suit because there was nothing in the proceedings, *per se* to complain of, counsel conclude that they will take the advice of the court and compel the company to stand by its contract. But in which court shall they seek the remedy? Counsel say in the United States Court. How will they get in? There are no provisions in the Federal law which, under the facts, will give them that privilege, as their client is a resident of this state. They cannot file an original bill to set aside the decree because the decree was entered by consent pursuant to the agreement, and there are no grounds for vacating it. They cannot file a bill of review for the same reason, and because there are no errors apparent in the decree. They cannot file an original bill in the nature of a bill of review, because the decree was not obtained by fraud, nor otherwise improperly. Consequently they have but one remedy left, that is to compel the company to abide by its agreement, and that remedy can only be applied in the state court.

IV.

THERE WAS NOTHING IMMORAL, INEQUITABLE, IMPROPER OR WHICH COULD HAVE RESULTED TO THE INJURY OF ANY ONE IN THE AGREEMENT.

As to the alleged immorality of the agreement: Counsel say that there were some judgments against Mrs. Kirchhoff which were rendered subsequent to the making of the trust deed, but prior to the deed from Mrs. Kirchhoff to the company, and that any agreement between the company and Mrs. Kirchhoff to the effect that the foreclosure proceedings should be continued to decree and sale

for the purpose of depriving those judgment creditors of their liens would be illegal, immoral, dishonest and fraudulent; that the United States Court would have turned with disgust from any attempt to perpetrate such a fraud through its instrumentality.

Counsel have not explained just how anyone would be defrauded, for if there were judgments against the property while the title was in Mrs. Kirchoff the lien of those judgments would again attach when she should be again invested with title by conveyance from the company.

But counsel have made a mistake in regard to the facts in the case, which is by no means a novel experience with them. *There were no judgments against Mrs. Kirchoff which were liens upon the property.* There had been judgments against her and a sale had been made of one of the lots under one of those judgments and a sheriff's deed issued. (Pr. Rec., 112.) This deed was an adverse intervening title and not a lien upon the premises. Mrs. Kirchoff desired to retain her home and was paying to the company its full appraised value, and we do not understand why she was not entitled to a clear title to the property. She was certainly under no obligations either legal or moral to redeem this property for the benefit of an adverse claimant. The interests of the parties demanded that the estate should not merge by the execution of the deed to the company, and equity will permit them to be kept separate for the purpose of doing exactly what was done in this case—foreclosing the mortgage and thus cutting off the intervening title.

15 Amer. & Eng. Enc. of Law, 322 *et seq.*

We cannot admire that peculiar ethical faculty of counsel which would turn with such abhorrence from so inno-

cent a transaction, and yet so ably champion this plaintiff in error in its attempt to repudiate an agreement eminently fair to it, and to deprive this defendant of her home, simply because subsequent events seemed to indicate that it would be to its interest to do so.

In *Udell v. Davidson*, 7 Howard, 769, which was a writ of error to the Supreme Court of Illinois, affirming a decree which decided that certain land in the hands of Udell was chargeable with a trust and directed that it be sold and the proceeds applied accordingly. The plaintiffs in error defended upon the ground that the transaction between Udell and Gregory, in which they participated, was against the policy and in violation of the provisions of a certain act of 1838, relating to public lands and insisted that by this fraud upon the government he obtained a deed to himself for the land and that he being trustee of certain creditors had used the money which belonged to his *cestui qui trusts* to accomplish his purposes and contended that by means of this fraud upon the government he acquired under this act of congress a right to perpetrate a fraud upon his *cestui qui trusts*, the courts say: "This, in plain words, is the amount of his defense and that is the right or privilege which he claims under the provisions of the act of 1838 and calls upon this court to recognize and maintain. We shall not comment on such a claim."

Plaintiffs in error seem to rely greatly on *Randall v. Incard*, 2 Black, 585. There the court says: "The agreement was only to cover up the real ownership of the property." In the case at bar, it was to cause the title to be placed in the real owner, where it would be subject to all her just debts. The former case sought to impeach the decree. In the case at bar, the giving of the
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deed and the obtaining of the decree were part of the larger agreement with respect to the return, for an agreed sum, of her homestead to Mrs. Kirchoff.

In *Randall v. Howard* the arrangement was to fraudulently transfer a life estate into a fee simple title and to defraud creditors. In this case the title was to go directly to the party who had previously held it, and no creditor could be injured, except by refusal of the Insurance Company to comply with its agreement.

In *Randall v. Howard* the court says: "The statements of the bill are vague and uncertain and rarely plain and direct."

In this case the bill is definite and clear, and the court finds that the agreement was made. In that case the courts say: "The nature of the agreement we do not learn."

In this case the terms are definite.

In that case the courts also say: "There are several other grounds decisive against the relief prayed for," and proceed to enumerate some of them, namely:

That the bill brought in review various matters passed on in the suit by the Cecil County Circuit Court; that it sought to annul a sale of lands made by virtue of the decree of that court; to effect the distribution of the proceeds of the sale; to enjoin the defendant from making any disposition of the lands purchased by him and to invalidate his title. It also found that the money arising from the sale was still undisposed of and that the whole case was under the control of the court, and that not even a supplemental bill was needed to prevent the wrong complained of. In the former case the friendly arrangement

was made after the decree was entered; the decree was not in pursuance of an agreement.

In the case at bar, the title passed by the deed before the decree was entered, and the decree was inoperative as divesting the Kirchoffs of their record title, the same having been done by the previously executed and recorded deed. The bill in the case at bar was not to annul the decree, but it admits and avers that the title passed thereby and by the deed to the Insurance Company, and asks that the company be required to convey as agreed.

The construction which plaintiff in error seeks to give to the decision in *Randall v. Howard*, would make it impossible for the complainant in a foreclosure suit to deal with the decree in any way before its entry. If that construction is correct then no agreement as to the disposition of the decree made between the Insurance Company and Mrs. Kirchoff, before the entry of the decree, would be binding although, it might have been reduced to writing and based upon a full consideration. If such a *written* agreement could be enforced the *jurisdiction* of the state court cannot be denied merely on the ground that the agreement was oral. The fact is that the contract was that a partial interest in the property covered by the decree should be vested in Mrs. Kirchoff, but the security of the Insurance Company was not to be impaired. If the company could not make in advance a valid contract with her for such partial interest in the land embraced in the decree when entered neither could it make, in advance, a valid contract to sell the whole or part of the decree or property referred to therein to a stranger. Such a rule surely could not be adopted. Equity, in obedience to the cardinal rule of natural justice that a person should perform his agreement enforces, pursuant

to a regulated and judicial discretion the actual accomplishment of a thing stipulated for, on the ground that what is lawfully agreed to be done ought to be done, and is in contemplation considered as now done.

SECOND.

IF THE COURT SHOULD HOLD THAT A FEDERAL QUESTION IS INVOLVED IN THIS CASE, THEN SUCH QUESTION WAS CORRECTLY DECIDED.

a. The proper effect was given to the decrees of the Federal court.

The only claim worthy of consideration as supporting the jurisdiction of this court is that the plaintiff in error sets up a title derived under a decree of the United States Court. If that claim is sufficient to support the jurisdiction of this court then the only further question to be determined is whether, assuming the agreement to have been made as alleged, the state court properly decided that, notwithstanding the foreclosure proceedings, the company should be compelled to convey.

What effect is to be given to a judgment or decree of the United States Circuit Court? Only the same effect as the state court would give to its own judgment or decree.

Dupasseur v. Rochereau, 21 Wall., 130.

Crescent City Live Stock Co. v. Butcher's Union Slaughter House Co., 120 U. S., 141.

In *Dupasseur v. Rochereau*, *supra*, it is said: "The only effect that can be justly claimed for the judgment in

“ the Circuit Court of the United States is such as would
 “ belong to judgments of the state courts rendered under
 “ similar circumstances.”

Assuming the agreement to have been made as alleged, and as found by the courts of Illinois to have been proven, was the complainant entitled to the relief granted and to a conveyance from the company, or was she concluded by the decree in the Federal court, which it was agreed between the parties should be entered, in order to perfect the title to the premises in the company.

The title was acquired by the company *under the deed of defendant in error and under these foreclosure proceedings pursuant to the agreement* that as soon as it so acquired title it would convey to the plaintiff in error and take a mortgage back to secure the sum of \$10,000. Having declined to execute that agreement after the title was perfected in it, a court of equity will consider it as holding the title in trust for the security of the \$10,000; and because of the pre-existing relations between the parties of the mortgagor and mortgagee the bill may be said to partake in many respects of the nature of a bill to redeem. But courts of equity never regard the form of the transaction. It was to avoid these formalities that the court was originally established, so that every case might be decided upon its own merits and upon the particular facts. It is not necessary that the bill have a specific title. The field of equity is too broad to permit the use of copyrighted forms in its pleadings.

What amounts to a trust or out of what facts a trust may spring, are not Federal questions, and on a writ of error to a state court this court can review only Federal questions.

Smith v. Adist, 23 Wallace, 368.

The defendant in error owed the plaintiff in error a sum of money and the plaintiff in error held the title to certain property which it was intended by both parties should belong to the defendant in error and should secure the plaintiff in error the amount of its claim. To that extent the relation of the parties was that of mortgagor and mortgagee.

The statute of the State of Illinois (Chap., 95, Sec. 12) provides that "every deed conveying real estate which "shall appear to have been intended only as security in "the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage."

This statute has been in force in the State of Illinois in its present form for the last fifty years, and is only declaratory of the well settled rule applicable to courts of equity and always followed by the courts of that state.

This court has adopted the same rule in no uncertain terms. In *Peugh v. Davis*, 96 U. S., 332, the court said :

"It is an established doctrine that a court of equity "will treat a deed absolute in form as a mortgage when "it is executed as security for a loan of money. That "court looks beyond the forms of the instrument to the "real transaction, and when that is shown to be one of "security and not of sale, it will give effect to the actual "contract of the parties. As the equity upon which the "court acts in such cases arises from the real character "of the transaction, any evidence, written or oral, tending to show this is admissible."

See, also, *Villa v. Rodriguez*, 79 U. S., 323, where it is said :

"To give validity to a sale by a mortgagor it must

"be shown that the conduct of the mortgagee was, in
 "all things, frank and fair, and that he paid for the
 "property what it was worth. He must hold out no de-
 "lusive hopes; he must exercise no undue influence; he
 "must take no advantage of the fears or poverty of the
 "other party. Any indirection or obliquity of conduct
 "is fatal to his title. Every doubt will be resolved
 "against him. Where confidential relations and the
 "means of oppression exist, the scrutiny is severer than
 "in cases of a different character. *The form of the in-*
 "*struments employed is immaterial.* That the mortgagor
 "knowingly surrendered and never intended to reclaim is
 "of no consequence. If there is vice in the transaction
 "the law, while it will secure to the mortgagee his debt,
 "with interest, will compel him to give back that which
 "he has taken with unclean hands."

b. The agreement was predicated on a valuable considera-
tion, and the property was a proper subject for negotia-
tion.

The company's attorney conceded that "they could
 "make no adjustment with Mrs. Diversey without the as-
 "sent of the Kirchoffs," and they sought to reform a
 a description of part of the lands of Mrs. Diversey. (Pr.
 Rec., 400.) "On January 1, 1879, Kendall, the attor-
 "ney of the Insurance Company in Chicago, wrote the
 "company that in his opinion an offer to Mrs. Diversey
 "to let her retain forty acres of the land would induce
 "her to give the company a deed of the balance of the
 "property; that Kirchoff would surrender all his prop-
 "erty and make an arrangement to buy back his home-
 "stead at a liberal price, but: 'I do not dare to settle
 "with him without settling the whole case,' as Mrs. Di-
 "versy's matters may be complicated by any settlement

“with Kirchoff.” (Pr. Rec., 306.) To this the company replied: “If settlement can be made of all complications and with quitclaims from all parties, we will consent to let her keep forty acres.” (Opinion Sup. Ct., Ill., Pr. Rec., 306, 309).

The foreclosure suit had been pending for some time prior to the consummation of the agreement, but when the agreement was made the deed from Kirchoff to the company was executed and delivered, and it was expected that the suit would be dismissed.

Suppose there had been no intervening claim or title and no occasion, therefore, for proceeding with the foreclosure would it, in such case, have been claimed that Mrs. Kirchoff could not have insisted upon compliance with the contract, on the part of the plaintiff in error?

The contract had been made and on the part of the defendant in error fully executed. She had parted with her title.

It is, however, claimed that the discovery of the intervening title, a merely incidental matter and her consent to have the same removed by the decree another incidental matter—alike for the benefit of both, ought to deprive her of all rights under the contract and enable the plaintiff in error in a court of chancery to refuse to convey as agreed.

We do not think this court will concur in this view.

Suppose the contract had been by one of two parties to convey to the other a parcel of land which at the time it was supposed the former contracting party owned, and suppose it were later found that he did not have the title but that it was to come by patent from the government, would it be claimed that such parties could not agree to delay the deed till the patent should be issued?

And would it be claimed that such a contract would draw in question the validity of the patent? Surely not. And yet there is no real distinction between such a case and the case at bar.

c. It is not necessary to give the proceeding a label.

In chancery a right presupposes a remedy and the course pursued by the defendant in error was the only course open to her.

Judge GARY, in delivering the opinion of the Appellate Court said (Pr. Rec., 399): "This is an appeal to a
"court of equity by the complainant that she may have
"her property restored to her upon the terms that she
"shall discharge the burden upon it fixed in amount by
"agreement."

The state Supreme Court in its first opinion (Pr. Rec., 311) says:

"The witnesses, in speaking of the agreement—some of
"them speak of it as one to redeem, while others speak
"of it as one to re-purchase. Kirohoff says it was to
"get the homestead back. Kendall says that they were
"to be allowed to redeem or re-purchase, but this is im-
"material; the form of the transaction in a court of
"equity is not to be regarded.

"The Kirchoffs conveyed away their right of redemp-
"tion to a number of tracts of land (these included) and
"in consideration they were to have the two lots free
"and clear from the deed of trust upon payment of a
"certain sum of money."

In the second opinion by the Supreme Court of the state it is said (Pr. Rec., 516, 517):

"Much of the argument of counsel for appellant is de-
"voted to an effort to show a want of jurisdiction in the

“Circuit Court of Cook County, over the subject-matter of this litigation.

“Whether upon this second appeal that is an open question, we do not deem it important to determine, being clearly of the opinion that the position of counsel is untenable.”

“Whether the bill be called a bill to redeem, or given another name, can in no way affect the question of jurisdiction of the state court.

“The relief sought is the enforcement of a contract to re-convey the premises in question, which we have already held the complainant entitled to.

“Her rights grow out of the alleged contract and not by reason of anything that was done or could have been done by the Federal court in the foreclosure suit.

“That a court of equity has jurisdiction to enforce the contract, whether it be called a contract to redeem or to reconvey, is, we think, too clear for argument.”
(Pr. Rec., 517.)

d. Though the question relates only to the character of the evidence and is, therefore, as we view it, a matter exclusively for the state courts, yet the agreement was not repugnant to the statute of frauds.

This is pre-eminently a case where an action for damages would not have been availing. It related to the homestead and comes within the rule that equity will interfere and enforce compliance with contracts where damages do not give adequate relief.

The remedy is always successfully invoked where, from the character of the property, it has a special value.

Clark v. Flint, 22 Pick., 231.

Chamberluin v. Blue, 6 Blackf., 491.

Clearly, the property in this controversy had a peculiar value to the plaintiff, having been her residence for so many years. She was to pay, upon a reconveyance of it, its full market value, and the only inducement for her to solicit a reconveyance or to perform the contract on her part, was the affection which she naturally felt for her home. Should relief in equity be refused she would be without remedy, for, in the language of Chief Justice TAYLOR, in *Williams v Howard*, 3 Murph., 74: "There is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart."

It is true that this is in a measure a parol contract, but it possesses many of the attendant circumstances which combine to take it out of the statute of frauds. Those circumstances are:

1. Part performance and possession.
2. Part performance induced by fraud.
3. The impossibility of placing the parties *in statu quo*.

The appellee executed her quitclaim to the company and refrained from interposing any defense to the foreclosure proceedings. It is true that she did not *take* possession under the agreement, because she was already in possession. It is also true that her husband accepted a lease from the receiver, but it was proven that when he executed that lease it was considered by him and the company's agent as a mere formality, and he was told the rent to be paid thereon should be credited on the amount due under the agreement. (Pr. Rec., 87.)

The execution of the lease in no way transferred the possession to the appellant or to the receiver, because it was a part of the agreement; and after the company ac-

quired title to the premises under the master's deeds and the functions of the receiver had ceased, appellee remained in possession of the premises many months, the deeds having issued on the 21st of January, 1882, and she not vacating the premises until the 1st of May following; nor does it appear that during that time either she or her husband paid any rent for the premises. *She was holding under the agreement.*

Warren v. Warren, 105 Ill., 568.

It will scarcely be contended that this controversy is free from the element of fraud on the part of the company. Its refusal to carry out the agreement after having accepted appellee's conveyance executed on the faith that the company would reconvey to her, and after having lulled her into security so that she interposed no defense to the foreclosure suit is deserving of no other name.

It has been frequently held that fraud is a complete reply to the statute of frauds. In *Ryan v. Doe*, 34 N. Y., 307, the court say: "The distinct ground upon which courts of equity interposes in cases of this sort, is that otherwise one party would be enabled to practice a fraud upon the other, and it could never be the intention of the statutes to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statute are promoted, instead of being obstructed, by such a jurisdiction of recovery and relief." And again: "The fact that an agreement is void under the statute of frauds does not entitle either party to relief in equity, but other facts may; and when they do, it is no answer to the relief that the void agreement was one of the instru-

“ mentalities through which the fraud was effected.
 “ Where one of the parties to the contract, void by the
 “ statute of frauds, avails himself of its invalidity, but
 “ unconscientiously appropriates what he has acquired
 “ under it, equity will compel restitution; and it consti-
 “ tutes no objection to the claim that the opposite party
 “ may procure the same practical benefit through the pro-
 “ cess of restitution, which would have resulted from the
 “ observance of the void agreement.”

The doctrine in Illinois is that *when a party induces another to execute a conveyance to him by promising to convey to a third person, he will be considered as holding the title in trust for such third person; and we fail to see any distinction between such promise and one to reconvey to the grantor.*

Langtry v. Langtry, 51 Ill., 458.

Fishbeck v. Gross, 112 Ill., 203.

Where one of the contracting parties has been induced or allowed to alter his position on the faith of an oral contract within the statute of frauds, to such an extent that it would be a fraud on the part of the other party to set up its invalidity, equity will make the case an exception to the statute.

Reed on the Statute of Frauds, Sec. 553.

A conveyance by a husband and wife, passing her dower and homestead rights, is sufficient part performance of a verbal contract that if she would join in the deed the vendor would convey other land to her.

Farwell v. Johnston, 34 Mich., 343.

But the agreement does not rest entirely in parol. Kendall on the 1st of November, 1879, forwarded to the com-

pany, for execution, a deed to defendant in error of one of the lots in question, and in the letter of transmittal says: "There was an understanding between Warfield, Kirchhoff and myself that the company would sell this lot back to him," etc. (Pr. Rec., 222) Surely, here is a sufficient *manifestation in writing* to permit the introduction of parol evidence to show what were the terms of the agreement under which the company held title to these lots. And it makes no difference that the correspondence was not with the complainant.

Kingsbury v. Burnside et al, 58 Ill., 310.

In *Morrell v. Cooper*, 65 Barb., 512, the parties after a sale of the mortgaged premises under a decree of foreclosure entered into a parol agreement, by which the mortgagee was to reconvey to the mortgagor upon payment of the indebtedness. Upon the faith of these promises the mortgagor acquiesced in the sale and omitted to apply by motion to have it set aside. It was there held to permit a party to avoid his agreement under such circumstances would be allowing the statute of fraud to be used as an instrument of fraud instead of a shield against it, and the mortgagee was compelled to convey.

In the case of *Beegle v. Wentz*, 55 Pa. St. Rep., 369, Beegle recovered a judgment against Wentz and levied upon certain land belonging to the judgment debtor, and upon which he resided. Wentz claimed his exemptions under the statute. Upon this a parol agreement was entered into between the parties, by which it was agreed that the land should be sold by the sheriff and bought in by the creditor and that upon consideration of the debtor waiving his exemptions Beegle would reconvey to him a part of the premises. Upon obtaining title to the premises

Beegle refused to reconvey and brought ejectment; the defendant set up the parol contract. In delivering its opinion the court said:

“ The distinguishing feature of this case is that the agreement of Wentz was not to acquire a new interest in the land by parol; but he was the owner of the land; had a title both legal and equitable and a right to retain so much of the land as would be of the value of \$300. It was this subsisting title which Beegle persuaded Wentz to forego by his promise to leave him his house and fifteen acres and make over to him the sheriff’s deed for that part. This part he was not to take, but to hold in trust. His language was, that he did not want to take their home from them. That he would give them a home of fifteen acres, provided Wentz would sign some agreement to let him sell the whole tract; and he would buy the land and give them a sheriff’s deed for the fifteen acres. * * * The trust in such cases arises *ex maleficio* on the principle that equity will not permit one to deprive another of the title which he actually has by such a promise not intended to be performed. * * * Nor does it make any difference that the title was acquired by Beegle through a judicial sale.”

That case is cited with approval by the Supreme Court of Illinois in the case of *Fischbeck v. Gross*, 112 Ill., 208.

The general rule is stated by POMEROY, as follows:

“ Whenever a person acquires the legal title to lands by means of a verbal promise to hold them for a certain specified purpose, as for example, a promise to convey them to a designated individual, or to reconvey them to the grantor and the like; and having thus ob-

"tained the title, fraudulently retains, uses and claims
 "the lands as absolutely his own, so that the whole
 "transaction by means of which the ownership was ob-
 "tained is based upon deceit, and is, in fact, a scheme of
 "actual fraud, such party is regarded as holding the
 "lands charged with an implied trust arising from his
 "fraud, and he will be compelled by a court of equity
 "to execute this trust by performing his agreement
 "and by conveying the estate in accordance with his
 "promise."

Pomeroy on Specific Performance, 144.

Plaintiff in error asks what a decree of foreclosure gives if it does not cut off all preceding contracts with the mortgagor respecting the mortgaged premises.

We answer, it cuts off whatever is inconsistent with the decree but an agreement for a decree is not inconsistent with such decree. So a warranty deed divests the grantor of his title but the execution and delivery of such deed does not estop the grantor and grantee from enforcing a previous contract which provides that such deed should be made and that a subsequent disposition should be made of the title so conveyed.

So, also, there is no reason why a binding agreement may not be entered into with respect to a specific use or disposition to be made of land after a decree of foreclosure.

Upon the oral argument in this court on the previous hearing, his Honor, Justice White, put to counsel for plaintiff in error this very pertinent inquiry: "If this
 "alleged agreement as claimed by the defendant in error
 "had been reduced to writing, do you say that its en-
 "forcement would then involve a question of a Federal

"nature?" To which counsel responded in the negative. But how is the plaintiff in error in a better position before this court than it would have been in if the agreement had been reduced to writing? How does the character of the evidence upon which the agreement is established affect the jurisdiction of the court? The Supreme Court of the State of Illinois has found and stated all the material elements of the contract with as much certainty as if it had been reduced to writing between the parties. That finding is conclusive, and if the enforcement of a written agreement specifically stating the terms of such contract as claimed by the defendant in error in her bill would not involve a Federal question, then none is involved in this case.

Many of the citations of plaintiff in error refer to cases where the transactions are illegal and immoral.

They have no application to the case at bar.

e. Issues of fact are not reviewable by this court.

Much space has been covered by counsel for plaintiff in error in a discussion of the evidence upon which the finding of facts by the state courts was based. As we have already stated we do not understand that this court will go into an examination of those questions. In the case of Roby v. Colehour, supra, this court, after deciding as a matter of law, that if Roby was under a trust obligation when he went into bankruptcy and purchased the lands in question from his assignee, he could not, by such purchase, acquire title to the premises which would defeat the interests of his cestuis que trust, says: "Whether or "not such relations in fact existed between the Colehours "and Roby as prevented him, consistently with those "relations, from purchasing the lands for himself, in

“ other words, whether he was the attorney of the Cole-
 “ hours when he acquired the legal title, or whether upon
 “ principles of equity, Roby should be deemed to have
 “ acquired the title for them and himself, subject to the
 “ declaration of trust referred to in the pleadings and
 “ decree, *are not questions of a Federal nature. The*
 “ *decree below in respect to those matters is not subject to*
 “ *re-examination by this court.*

“ And further, the rule that the Supreme Court
 “ has no authority to review questions of fact upon
 “ a writ of error extends also to a case in which
 “ a state Supreme Court finds against the existence
 “ of a fact relied upon by the plaintiff in error
 “ as raising a Federal question; as, where he contended
 “ that the granting of a town site patent on lands known
 “ to be valuable for mining purposes did not prevent the
 “ subsequent location of a mining claim thereon, and the
 “ court found that the lands were not known to be valu-
 “ able for mining at the time the patent took effect.

“ *Dower v. Richards*, 151 U. S., 658 and
 “ cases cited.”

In the case at bar plaintiff in error contended that there was, in fact, no contract; the state court has found the fact to have been otherwise.

In *Dower v. Richards*, *supra*, where the whole matter is thoroughly discussed, the court says: “ The principal
 “ ground on which the plaintiff in error seek to reverse
 “ the judgment of the Supreme Court of California is
 “ that its decision, in matter of fact, was erroneous and
 “ contrary to the weight of the evidence in the case;
 “ but to review the decision of the state court upon the
 “ question of fact is not within the jurisdiction of this
 “ court.”

In the legislation of Congress, from the foundation of the government, a writ of error which brings up matter of law only, has always been distinguished from an appeal which, unless expressly restricted, brings up both law and fact.

Wiscart v. D'Auchy, 3 Dall., 321.

U. S. v. Goodwin, 7 Cranch., 108.

Cohens v. Virginia, 6 Wheat., 264, 410.

Hemmenway v. Fisher, 20 How., 255, 258.

In re Neagle, 135 U. S., 1, 42; 10 Sup. Ct., 658.

“ We have no authority as an Appellate Court, upon a writ of error, to revise the evidence in the court below in order to ascertain whether the judge rightly interpreted the evidence or drew the right conclusions from it. That is the province of the jury, or of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision.”

Mr. Justice STORY in *Hyde v. Booraem*, 16 Pet., 169, 176.

In *Kennedy v. Effinger* (1885), this court dismissed a writ of error to the Supreme Court of Appeals of the State of Virginia for reasons stated in the opinion delivered by Mr. Justice FIELD, as follows: “ The writ of error brought by the trustee raises no Federal question which we can consider. Whether the bond of Effinger was or was not executed with reference to Confederate notes is a question of fact for the state court and not one of law for this court.”

155 U. S., 577; 6 Sup. Ct., 185.

So, in *Moreland v. Page*, this court dismissed a writ of error to review the judgment of a state court upon a ques-

tion of the proper boundary between the two tracts of land, although the owner of each claimed under a grant from the United States ; and Mr. Justice GRIER, in delivering judgment, said : “ *It is a question of fact, depending on monuments to be found on the ground, documents in the land office, or the opinion of experts or surveyors appointed by the court or the parties. If the accident to the controversy that both parties claim title under the United States should be considered as sufficient to bring it within our jurisdiction, then every controversy involving the title to such lands whether it involve the inheritance, partition, devise or sale of it, may with equal propriety be subject to the examination of this court in all time to come.* ”

20 How., 522-523.

It is claimed that Warfield did not have authority to make the agreement. The Supreme, Appellate and Circuit Courts of Illinois have said that he did. Judge TULEY said :

“ As to the authority of Warfield and Kendall, or Warfield alone, to make the agreement concerning the homestead, if any such was made, there can be no question under the decisions of our Supreme Court in the Owen White and the Slee cases. The company stands in no position to question the authority of said agents. It received and retains the complainant’s quitclaim, conveying to the company her equity of redemption in all the mortgaged property, and will not be permitted to retain the fruits of the agreement and at the same time repudiate the authority of the agents by whom the complainant’s quitclaim deed was obtained. ”

It is said the correspondence of the agents with the offi-

cers of the company does not harmonize with their statements on the witness stand. Here, too, the language of Judge TULEY is applicable:

“A large amount of correspondence between the company and its agents, Warfield and Kendall, touching this loan, is introduced to show that the company was not advised that any such parol agreement with Kirchoff had been made. Complainant should not suffer, if such is the fact, because of such failure of the agents to advise their principal, as that is a matter between them, for which she is in no wise responsible. I am not satisfied from the evidence that all the correspondence between said parties has been produced, and am inclined to the opinion that it has not been.”

The true explanation of the failure of the correspondence to show the agreement more fully, is this: The company had vast interests in Chicago, and these agents were trusted with their administration. They were men of importance, both in their own eyes and in the eyes of the public. They were also salaried agents, whose remuneration bore no relation to the profitable administration of the company's affairs. It was to their interest to make an amicable settlement of the whole matter, and thereby avoid the trouble of an extended litigation. This fact, and the love of aggrandisement, which is inherent in the human species, led to the direct assumption and exercise of an authority which resulted in the making of the agreement in this case. After the arrangements had been completed and carried out on the part of Mrs. Kirchoff, the inevitable necessity of informing the principal arose. After waiting two months Kendall writes the letter of November 1, 1879, in and by which he seeks to obtain the ratification of the agents acts by proposing and

advising the acceptance of terms identical in nearly every respect with the contract. The company, it seems, in a letter to Kendall, objected to the arrangement, and Kendall, upon being advised of that fact, recorded the Kirchhoff deed and left events to shape their own course.

The continued employment of these agents depended upon the will of the superior. Displeasure meant dismissal. For Kendall to have dissented from the position taken by the president and returned the quitclaim deed to Kirchhoff would have been equivalent to handing in his resignation.

“ It is not necessary that the contract should be proved
 “ with that degree of moral certainty that is technically
 “ termed ‘ beyond a reasonable doubt ’ ; and mere conflict
 “ of evidence is not, of itself, a ground for refusing to
 “ grant the remedy. It is sufficient if the subject-matter
 “ and all the material terms of the contract can be deter-
 “ mined with reasonable certainty from all the evidence ;
 “ if the judge can ascertain from all the proofs what the
 “ contract really is, he must decree its execution and in
 “ the words of Lord COTTENHAM, ‘ he will endeavor to
 “ collect, if he can, what the terms of it really were.’ ”

Pomeroy on Specific Performance, Sec.
 137.

It is urged that Kirchhoff was informed that the company would not convey, and that thereafter the foreclosure proceedings were adverse. We will quote again from the opinion of the learned chancellor in the Circuit Court :

“ Kendall communicated the company’s decision to
 “ Kirchhoff, but just when does not appear, and thinks he
 “ tendered the Kirchhoff quitclaim back to Kirchhoff, al-
 “ though previously in his deposition he had stated that

“ he did not know of any such tender being made. Kir-
 “ choff, when told of the decision of the company, said
 “ that he had a fair agreement with the company and
 “ would insist upon its being carried out.

“ Upon obtaining abstracts of title it was discovered
 “ by Kendall that the equity of Mrs. Kirchoff had been
 “ sold and deeded upon a judgment obtained by E. F.
 “ Runyan. Kendall thereupon deemed it necessary to go
 “ on with the foreclosure proceedings, and to amend the
 “ bill which had been filed by making Runyan, then a
 “ non-resident, a party, and to serve new notice on Kir-
 “ choff as a party in possession. This was done on the
 “ 17th of January, 1880. Kirchoff, being notified, went
 “ to Kendall and Warfield to know what it meant, and
 “ was in substance informed that it was only for the pur-
 “ pose of making the title better, and that it would and
 “ should make no difference so far as his agreement to
 “ the re-purchase of the homestead was concerned, except
 “ in delaying the consummation of the agreement.”

Examine as well the opinions of the Appellate and Supreme Courts on these questions, and then determine whether under the issues here presented, this court will take upon itself the burden of setting aside the finding of these three courts and disturbing a settlement of rights obtained only after legal controversies lasting fifteen years. The courts of Illinois were influenced by no sectional bias, but only by a desire to do justice between the parties, recognizing that the functions of all courts, national and state, are for the protection of the rights of all.

Respectfully submitted.

IRA W. BUELL,
 WILLIAM S. HARBERT,
Solicitors for Defendant in Error.

UNION MUTUAL LIFE INSURANCE COMPANY v.
KIRCHOFF.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 155. Argued December 16, 17, 1897. — Decided January 10, 1898.

The defendant in error filed a bill against the plaintiff in error in a state court in Illinois to compel the performance of a contract to convey to her land in that State. The case proceeded to judgment in plaintiff's favor in the Supreme Court of the State, but was remanded with directions to take an account for the purpose of ascertaining for how much payment should be directed. A writ of error, sued out from this court to review that judgment was dismissed here on the ground that the judgment was not final. It does not appear that any right or title had been specially set up or claimed under any statute of, or authority exercised under, the United States in the courts below, or in the Supreme Court of Illinois, prior to such judgment of that Court. It appeared on the second hearing that prior to September 10, 1884, the United States had seized the property for revenue taxes due from a firm then occupying it as a distillery, the defendant in error being in no way connected with the firm, that the property was sold, the Government bidding it in and taking a deed for it, and that the Government conveyed to the plaintiff in error. In the account stated the defendant in error was required to repay the amount so paid with interest. It also appeared that the plaintiff in error, after the case went back, moved to amend its answer by setting up that title, as a right and title acquired and claimed under the Constitution, statutes and authority of the United States, which motion was refused, and the trial court disposed of the case on other grounds. In the Appellate Court and in the Supreme Court the plaintiff in error contended that there was error in refusing its motion; but the Appellate Court held, and

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its decision was sustained by the Supreme Court, that it was bound by the first decision, and that error could not be assigned, on the second appeal, for any cause existing at the time of the prior judgment. In this court it was contended that, at the second trial it appeared that plaintiff in error claimed to hold an absolute title to the lots in question by virtue of the foreclosure proceedings and of the master's deed obtained thereunder, and hence that the title was claimed under an authority exercised under the United States; that a Federal question was thereby raised on the record; that the decision of the case necessarily involved passing on the claim of title; that the opinion of the Supreme Court of Illinois showed that it was passed upon; and that the necessary effect of the decree and judgment of the state court was against the right and title of defendant sufficiently claimed under Federal authority. *Held*, that the point thus raised was certainly embraced by the first judgment, and that this court cannot revise the second judgment on the ground that the plaintiff in error was thereby denied any right, properly claimed, in apt time, in accordance with Rev. Stat. § 709.

Ozley State Company v. Butler County, 166 U. S. 648, cited, quoted from and approved to the point that the words "specially set up or claimed," in Rev. Stat. § 709, imply that if a party in a suit in a state court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare "specially," that is, unmistakably, this court is without authority to reexamine the final judgment of the state court.

THIS was a bill filed by Elizabeth Kirchoff in the Circuit Court of Cook County, Illinois, against the Union Mutual Life Insurance Company, to compel a conveyance of two certain lots in accordance with an agreement between the company and herself on payment of the amount due thereunder as provided for. The Circuit Court dismissed the bill on hearing, and the cause, after an ineffectual appeal directly to the state Supreme Court, 128 Illinois, 199, was carried to the Appellate Court, which reversed the decree of the Circuit Court, and remanded the cause with directions that an account be taken, and that, when the amount due the company was ascertained, a decree be entered that on payment of such amount, with interest, the company should convey to Mrs. Kirchoff. 33 Ill. App. 607. From this judgment the Insurance Company prosecuted an appeal to the Supreme Court, and the judgment was affirmed. 133 Illinois, 368. To review this judgment a writ of error was sued out from this court, but was dismissed

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on the ground that the judgment of the Supreme Court was not final. 160 U. S. 374.

The case had, in the meantime, gone back to the Circuit Court, an accounting had been had, and a decree had been entered settling the accounts between the parties, and ordering the Insurance Company to convey the property in question on payment of the amount found due. From this decree the Insurance Company appealed to the Appellate Court; the decree of the Circuit Court was affirmed, 51 Ill. App. 67; and this second judgment of the Appellate Court was affirmed by the Supreme Court. 149 Illinois, 536. To review the latter judgment the Insurance Company prosecuted this writ of error.

The facts as found by the state courts were substantially these: In May, 1871, the Union Mutual Life Insurance Company loaned \$60,000 to Elizabeth Kirchoff, her husband, Julius Kirchoff, and her mother, Angela Diversey, upon their judgment note, secured by trust deed, conveying many parcels of land belonging to them in severalty, among which were the lots in question, which lots belonged to Elizabeth Kirchoff. Default having been made in the payment of interest and taxes, judgment was taken against Mrs. Diversey, and later a bill was filed by the Insurance Company in the Circuit Court of the United States to foreclose the trust deed. The bill in addition sought to cure a misdescription of the property belonging to Mrs. Diversey, who filed an answer denying the right of the company to correct the misdescription, and averring that the note and mortgage were procured from her by misrepresentation. While this bill was pending an agreement was reached by the parties, pursuant to which the company released to Mrs. Diversey its claim upon forty acres of the land belonging to her, and she executed to them a warranty deed for the remainder, while Mrs. Kirchoff and her husband executed a quitclaim deed of all the property belonging to them and included in the trust deed, it being agreed as part of the transaction that Mrs. Kirchoff might purchase from the company the two lots above named for \$10,000, one thousand dollars in cash and nine thousand dollars in annual payments, for which Mrs. Kirchoff was to execute her notes, extending

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over a period of nine years, bearing interest at six per cent, and secured by mortgage upon the two lots. But as there was an intervening claim on one of the lots growing out of a sheriff's deed in pursuance of a sale on a judgment against Mrs. Kirchoff, rendered subsequently to the original trust deed but prior to the deed from Kirchoff and wife to the company, it was agreed that the foreclosure proceedings should continue to be prosecuted; that as soon as the company got a deed from the master it would convey to Mrs. Kirchoff and take the mortgage from her, and the company would thus obtain and convey clear title, and the mortgage back would be a first lien.

No defence was made to the foreclosure; the case went to decree and sale; and a master's deed was issued to the Insurance Company.

During the prosecution of the foreclosure proceedings a receiver had been appointed of all the property, and about nine months after the confirmation of the report of sale the receiver filed a petition, stating that Julius Kirchoff was in possession of the premises and refused to pay rent therefor, and asking for a writ of assistance to put the receiver in possession, to which Julius Kirchoff filed an answer setting up the agreement and objecting to the issue of the writ lest his rights be prejudiced; but the writ was nevertheless issued.

It appeared on the second hearing that prior to September 10, 1884, the United States had seized the property for certain revenue taxes due from a firm then occupying it as a distillery, Mrs. Kirchoff being in no way connected with the firm; that the property was sold, the Government bidding it in and taking a deed for it; and that the Government conveyed to the Insurance Company. In the account stated Mrs. Kirchoff was required to repay the amount the Insurance Company paid the Government, with interest.

The Supreme Court of Illinois held, on the second appeal, on the authority of *Mansfield v. Excelsior Refining Co.*, 135 U. S. 326, that the United States took no title by its deed as against Mrs. Kirchoff; and, further, that the Insurance Company could not set up any right under the deed from the

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Government, because of its acquisition long prior to the submission of the case upon the first appeal. No question was raised in this court in respect of this transaction.

Mr. Parmalee Prentice for plaintiff in error. *Mr. Frank L. Wean* and *Mr. Josiah H. Drummond* were on his brief.

Mr. William S. Harbert for defendant in error. *Mr. George R. Daley* and *Mr. Ira W. Buell* were on his brief.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

When this case was before us on the prior writ of error we were obliged to dismiss the writ because the judgment sought to be reviewed was not final. *Union Mut. Life Ins. Co. v. Kirchoff*, 160 U. S. 374. And the question whether, had this been otherwise, the jurisdiction could have been maintained, was necessarily not considered. That inquiry, however, now meets us on the threshold, as in order to invoke our jurisdiction on the ground of the denial of a title or right claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, such title or right must be specially set up or claimed at the proper time and in the proper way.

The judgment of the Supreme Court of Illinois, when the case was first before it, 133 Illinois, 368, established the agreement between Mrs. Kirchoff and the Insurance Company as claimed by her, and determined that she was entitled to the relief she sought by reason thereof, and the cause was remanded for the purposes of an accounting merely. And although the fact that the case was sent back for further proceedings deprived the judgment of that finality deemed essential to the issue of a writ of error from this court, yet it does not follow that the prior determination on the merits can be overhauled on the ground of the existence of a Federal question which was not raised when that determination was arrived at.

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As observed by the Supreme Court when the case was a second time before that tribunal, 149 Illinois, 536, 542: "Nothing is better settled than that where a cause has been reviewed by this court, and remanded with directions as to the decree to be entered, a party, on a subsequent appeal, cannot assign for error any cause that accrued or existed prior to the judgment of this court. All errors not assigned will be considered as waived, and cannot afterwards be urged. *Hook v. Richeson*, 115 Illinois, 431; *Village of Brooklyn v. Orthwein*, 140 Illinois, 620, and cases cited."

The record does not disclose that any right or title was specially set up or claimed under any statute of, or authority exercised under, the United States in the courts below or in the Supreme Court of Illinois prior to the decision of the latter court on the first appeal.

The original bill after setting up the agreement to the effect, among other things, that the title was to be perfected in the company by the foreclosure proceedings, as well as by complainant's deed of release and quitclaim, prayed that the company might be compelled to specifically perform the agreement and convey the lots to her on performance on her part. To this defendant filed a demurrer, assigning as cause, that the bill did not show a contract enforceable either at law or in equity. The demurrer was overruled and defendant answered, denying the averments of the bill, pleading the statute of frauds, and asking "the same right by its answer as if it had pleaded or demurred to said bill of complaint." The bill was subsequently amended, and prayed that complainant might be allowed "to redeem said premises according to the terms of said agreement; that said defendant may be compelled by the decree of this court to perform the said agreement with your oratrix and convey to her the said two lots of lands hereinbefore specifically described, according to the terms thereof, as before stated;" and for an accounting.

When from the judgment of the Appellate Court reversing the Circuit Court and directing the entry of a decree in complainant's favor on payment of the amount due from

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her to the company as ascertained on an accounting, the first appeal was taken to the Supreme Court, the errors there assigned nowhere in terms raised a Federal question. And, in affirming the judgment of the Appellate Court, the Supreme Court did not consider or discuss any Federal question as such in its opinion. The Supreme Court held that the agreement was fully made out, and that complainant was entitled to a conveyance of the lots; that it was not material whether the agreement was called an agreement to redeem or an agreement of repurchase, "as the form of the transaction, in a court of equity, is not to be regarded;" that the bill need not be treated as strictly a bill for specific performance, but it was enough that complainant was entitled to have her property restored to her upon discharging the burden upon it fixed in amount by the agreement.

The Supreme Court of Illinois further said: "It is also claimed that complainant's failure to assert the alleged agreement in the foreclosure proceedings is a bar to its assertion here—that the proceedings in the foreclosure are conclusive. We are unable to concur in this position. It was part of the arrangement under which the complainant was to obtain the two lots in controversy, that a decree of foreclosure should be entered, and that the premises should be sold under such decree. The decree was rendered and the sale made by consent, for the purpose of clearing the different tracts of land mentioned in the quitclaim deed, from certain incumbrances. The decree was not adverse to the interest of complainant, but in harmony with her interest. She is not attacking the decree, but claiming the enforcement of an agreement under which it was rendered, and in our judgment there is no ground for holding that the rights of plaintiff were cut off or in any manner impaired by the decree."

It is now contended that it then appeared that defendant claimed to hold an absolute title to the lots in question by virtue of the foreclosure proceedings and of the master's deed obtained thereunder, and hence that the title was claimed under an authority exercised under the United States; that a Federal question was thereby raised on the record; that the

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decision of the case necessarily involved passing on the claim of title; that the opinion of the Supreme Court of Illinois showed that it was passed upon; and that the necessary effect of the decree and judgment of the state court was against the right and title of defendant sufficiently claimed under Federal authority. But we cannot accept this conclusion.

In the recent case of *Oxley Slave Company v. Butler County*, 166 U. S. 648, 654, this court, speaking by Mr. Justice Harlan, said :

"The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons as well as in the absence of necessary parties who had no notice of the suit, and therefore no opportunity to be heard in vindication of their rights. Do such general allegations meet the statutory requirement that the final judgment of a state court may be reexamined here if it denies some title, right, privilege or immunity 'specially set up or claimed' under the Constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler County Circuit Court in the suit instituted by the county of Butler was not consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States. But can it be said that the plaintiffs *specially* set up or claimed the protection of that Amendment against the operation of that decree by simply averring—without referring to the Constitution or even adopting its phraseology—that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties?

"This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in section 709 of the Revised Statutes. These words were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court dis-

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posed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to reëxamine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence, the averment that a party resides in a particular State does not import that he is a citizen of that State. *Brown v. Keene*, 8 Pet. 112, 115; *Robertson v. Cease*, 97 U. S. 646, 649. Upon like grounds the jurisdiction of this court to reëxamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

Tested by this rule it is quite apparent that defendant did not specially set up or claim a Federal right or title within the meaning of section 709, and that no right or title so claimed was denied by the Supreme Court on the first appeal.

And as the judgment of that court determined the rights of the parties and left open only the amount due on the accounting, the suggestion of the disposition of a Federal question by that judgment comes too late.

After the case went back to the Circuit Court for the entry of decree in favor of Mrs. Kirchoff and the accounting, defendant moved for leave to amend its answer by inserting the following:

"And the said defendant, further, answering, says that by reason and in virtue of the said foreclosure decrees in the said

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United States court, the sale thereunder, the confirmation thereof, and all the acts and doings of said court therein, the said Union Mutual Life Insurance Company acquired a title and right to the lands aforesaid; that said right and title was acquired and is claimed under the Constitution, statutes and authority of the United States; that a decree for redemption or specific performance of the contract alleged in said bill would be against the right and title of said company thus acquired and hereby claimed under the Constitution, laws and authority of the United States; that a decree for redemption or specific performance, as prayed for in said bill, or either of them, would fail to give full faith, credit and effect to the said decrees, orders and acts of the United States Circuit Court in the foreclosure proceedings aforesaid; that a decree for redemption or specific performance, as prayed for, or either of them, cannot be entered without attacking and pretending to nullify or impair the said decrees, orders and acts of the said United States Circuit Court, and that, for the foregoing reasons, this court is without jurisdiction of the subject-matter of the action set forth in the bill of complaint and is without jurisdiction to enter a decree for redemption or specific performance, as prayed for in said bill of complaint."

But the Circuit Court refused to allow the amendment.

There was no contention that any Federal question arose on the accounting itself. The case having reached the Appellate Court the second time, the Insurance Company assigned, among other errors, that the Circuit Court erred "in that it did not dismiss complainant's bill for want of jurisdiction;" "in not holding that it was without jurisdiction to enter a decree allowing redemption;" "in entering a decree which would in effect nullify the decree and doings of the Circuit Court of the United States for the Northern District of Illinois;" "in entering a decree in conflict with the decree of the United States Circuit Court;" "in refusing to the defendant leave to file the proposed amendment to its answer;" "in entering a decree against the validity of titles claimed by defendant under the authority of the United States."

It will be perceived that, so far as Federal questions were

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thus attempted to be raised, they were all covered by the prior judgment.

The Appellate Court on the second appeal held itself bound by the previous decision and declined to enter on matters of defence which might have been availed of. The Supreme Court was of the same opinion, for it ruled that where a case had once been reviewed by the court, and remanded with directions as to the decree to be entered, error could not be assigned on a subsequent appeal for any cause existing at the time of the prior judgment. Nevertheless the Supreme Court said:

“Much of the argument of counsel for appellant is devoted to an effort to show a want of jurisdiction in the Circuit Court of Cook County over the subject-matter of this litigation. Whether, upon this second appeal, that is an open question we do not deem it important to determine, being clearly of the opinion that the position of counsel is untenable. It is said the suit is brought to review and set aside a decree of the United States Circuit Court, and the bill is treated, throughout the discussion, as hostile to the foreclosure proceeding in that court, or as attempting to obtain relief properly available in that action.

“This is a misapprehension of the scope and purpose of complainant's bill. In our former opinion we said: ‘After the settlement had been concluded, it turned out that certain incumbrances existed against some of the property, which were subsequent to the trust deed, but which would take priority to the quitclaim deed executed by complainant and her husband. It therefore became necessary, in order to obtain a perfect title, to go on with the foreclosure proceedings, which was done.’ This statement is based upon an allegation of the bill to the effect that, it being represented to the complainant by the attorney of the company that it would be necessary to foreclose the trust deed in order to make good the title in the company to the lots before they could take a mortgage thereon for the instalments of redemption money, it was agreed between the parties that the agreement for redemption should not be executed until after the title had been perfected

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in the company by foreclosure, but in the meantime complainant should execute and deliver to the company her quitclaim deed, and should interpose no defence to such foreclosure. The allegation was found, in the opinion above referred to, sustained by proofs, and is conclusive of that fact upon this appeal. The foreclosure decree in this Federal court was therefore as much the result of the agreement relied upon by complainant as was the making of the quitclaim deed by her. So far from this being an attempt to review, modify or set aside the decree of the United States Circuit Court, the right of action is predicated, in part at least, upon it.

"Whether the bill be called a bill to redeem, or given another name, can in no way affect the question of jurisdiction in the state court. The relief sought is the enforcement of a contract to reconvey the property in question, which we have already held the complainant entitled to. Her rights grow out of the alleged contract, and not by reason of anything that was done, or could have been done, in the Federal court in the foreclosure suit.

"That a court of equity has jurisdiction to enforce the contract, whether it be called a contract to redeem or to reconvey, is, we think, too clear for argument."

The Supreme Court did not decide that the case was reopened as to matters previously adjudicated, and we cannot regard these observations as amounting to such disposition, on a second appeal, of Federal questions which might have been, but were not, raised on the first appeal, as would justify us in taking jurisdiction.

It was further argued at this bar that the agreement was fraudulent and illegal as respected the foreclosure decree; and that the decree of the state court upholding an agreement thus tainted, ascribed to that decree an operation which would not have been permitted in the courts of the United States, and in that view involved a review thereof or a refusal to give it its due effect.

We do not find that the state courts were asked to pass on any such question. If it was really contended before them that the agreement was invalid on the ground that it provided

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that the United States court should go to decree and sale in order to cut off intervening liens, it may be conceded that those courts held, on the facts appearing, that the agreement was not open to that objection, but it would not follow that thereby a Federal question was disposed of. And the point was certainly embraced by the first judgment.

We are of opinion that we cannot revise the present judgment on the ground that plaintiff in error was thereby denied any right properly claimed, and in apt time, in accordance with § 709 of the Revised Statutes.

Writ of error dismissed.
